IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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SUPREME COURT, U.S.

No. 74-6212

GREGORY NORTON, JR., a minor, by his next friend, Marian B. Chiles,

Appellant,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

C. CHRISTOPHER BROWN

Legal Aid Bureau, Inc.
341 North Calvert Street
Baltimore, Maryland 21202

Attorney for Appellant

MARCH 18, 1975

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the single district judge on the nonconstitutional aspects of this case is reported as Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972). It is reproduced as

Appendix B, attached to this Statement. The original opinion of the three-judge district court on all aspects of this case is reported as Norton v. Weinberger, 364 F.Supp. 1117 (D. Md. 1973). It is reproduced as Appendix C, attached to this Statement. The three-judge district court's majority and dissenting opinions after this Court's remand, 418 U.S. 902 (1974), are not yet reported. They are reproduced as Appendix D, attached to this Statement.

JURISDICTION

A three-judge district court, convened pursuant to 28 U.S.C. §§2282 and 2284, entered its final judgment in this case on February 28, 1975, denying appellant's request for an order permanently enjoining enforcement of certain provisions of 42 U.S.C. §416(h)(3)(C). A copy of the judgment is attached to this Statement as Appendix E. The notice of appeal to this Court was filed on March 17, 1975. It is attached as Appendix A. This Court's jurisdiction is conferred by 28 U.S.C. §1253.

QUESTIONS PRESENTED

Where paternity is not at issue, whether the provisions of the Social Security Act which require certain illegitimate children to prove dependency on a deceased wage earner in order to qualify for social security child's insurance benefits, while irrebuttably presuming such a showing by legitimate children and another class of illegitimate children, violate the due process clause of the Fifth Amendment.

Whether appellant nevertheless factually met the statutory dependency requirement of the Act.

STATUTES INVOLVED

The relevant portions of Sections 202(d), 216(e) and 216(h) of the Social Security Act, 42 U.S.C. §§402(d), 416(e), and 416(h), were reproduced as an Appendix to the three-judge court's original opinion, attached to this Statement as Appendix C.

STATEMENT

The appellant is an illegitimate child who qualified in all respects for child's insurance benefits pursuant to Section 216(h)(3)(C) of the Social Security Act except that he was found to have failed to establish that his deceased father was living with him or contributing to his support at the time of his father's death, as required by subsection (ii) of that section, 42 U.S.C. §416(h)(3)(C)(ii). Such proof is not required, and, in fact, irrebuttably presumed, for legitimate children and certain other illegitimate children. If appellant were legitimate, or had fallen into the other classifications of illegitimate children, he would have been found eligible for child's insurance benefits and now be receiving them.

The Social Security Act sets up two categories of children with respect to proving eligibility for child's insurance benefits. To be eligible, legitimate children need merely establish that their fathers were wage earners covered by the Act and that they were their fathers' children. The Act does not require them to establish any degree of dependency on their fathers since by operation of law they are deemed to have been dependent. See 42 U.S.C. §402(d)(3).

Certain illegitimate children are also irrebuttably presumed dependent on their fathers. This presumption applies to those illegitimate children who are the children of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed, see 42 U.S.C. §402(d)(3) and 416(h)(2)(B); those who establish their fathers' paternity by a written acknowledgement, court paternity decree, or court support order, see 42 U.S.C. §§402(d)(3) and 416(h)(C)(i); and those who could establish paternity under their state's intestate succession law. See Jimenez v. Weinberger, 417 U.S. 628, 631 n.2 (1974).

All other illegitimate children who have satisfactorily established their fathers' paternity are not benefited by this presumption. Instead, they must establish the additional element that they were living with or supported by their father at his death. See 42 U.S.C. §§402(d)(3)(A), 416(h)(2)(A), and 416(h)(3)(C)(ii).

Appellant was born out of wedlock to Gregory Norton, Sr., then 16, and Laurie Marie Brown, then 14. Both teenage parents were high school students living with their respective parents. They never married and never actually lived together. At Gregory, Jr.'s birth, his father "contributed $6.00 and some gifts of clothing and other baby habiliments, but never actually undertook the support of the child, being an unemployed student at the time." Norton v. Richardson, 352 F.Supp. at 600. Soon thereafter Gregory, Sr. entered the Army and, at age 19, was killed while serving in Vietnam. Although prior to his death he had made some attempts to authorize a military allotment for Gregory, Jr., this procedure was incomplete at the time of his death. See id.

Appellant's application to the Social Security Administration for child's insurance benefits on his deceased father's account was denied. Although the Administration acknowledged that appellant had established his father's paternity, it found that he had failed to prove that he had lived with or been supported by his father.

In his complaint in this action, appellant sought declaratory and injunctive relief on due process and equal protection grounds against the requirement that he and his class establish "support or living with" in addition to paternity. Alternatively, assuming the constitutionality of this extra burden on illegitimate children, appellant asserted that he in fact had met this statutory requirement.

The district judge initially assigned to the case resolved this latter nonconstitutional issue while sitting as a single district judge. He upheld the Secretary's determination that appellant's evidence was insufficient to establish that his father had lived with or supported him at the time of his death. Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972) (App. B). A three-judge court was then convened to hear the constitutional issue.

The three-judge court upheld the constitutionality of the extra-proof requirement after concluding that the purpose of the Social Security Act was to provide benefits to actual dependents of deceased wage earners and accordingly it was not improper for the Act to presume dependency for those classes most likely to have actually been dependent, while requiring actual proof of

dependency from those classes of illegitimate children less likely to have been actually dependent. The court concluded that because the dependency requirement placed on appellant's class did not lack a rational relationship to the Social Security Act's purpose or intent, it therefore was not violative of the due process clause of the Fifth Amendment. Norton v. Weinberger. 364 F.Supp. 1117 (D. Md. 1973)(App. C).

Acting on appellant's initial appeal, this Court vacated the district court's judgment and remanded the case for reconsideration in light of Jimenez v. Weinberger, 417 U.S. 628 (1974). See Norton v. Weinberger, 418 U.S. 902. Upon remand, the district court, with one judge dissenting, reaffirmed its original holding. (App. D). This appeal was then timely noted. (App. A).

THE QUESTION IS SUBSTANTIAL

Appellant submits that the district court seriously erred in interpreting a significant provision of the Social Security Act, our nation's most significant social legislation, and in applying well-established constitutional principles to its content. The impact of this decision is magnified because of its broad adverse effect on illegitimate children across the nation[1/] --a class of children who have traditionally been socially disfavored and "subjected to . . . a history of purposeful unequal treatment." Compare San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). As such, these children should "command

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1/ This case would appear to have much broader applicability than did Jimenez v. Weinberger, 417 U.S. 628 (1974), in which probable jurisdiction was noted.

extraordinary protection from the majoritarian political process." Id. Finally, this case may very well turn upon the question of the appropriate equal protection standard which must be applied to classifications discriminating against illegitimate children. The proper standard for this application is presently the subject of much confusion among federal courts. The constitutionality of these provisions presents a question of sufficient importance to warrant plenary review by this Court.

A. Contrary to the District Court Majority's Interpretation, Congress Intended Child's Insurance Benefits to Replace the Loss of the Right to Receive Support, Not Merely Actual Support

The district court held that the child's insurance benefits provisions of the Social Security Act were founded upon a concept of actual dependency: "These provisions were designed not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended." (App. C at 25). The majority rejected appellant's assertion that the Act in fact merely required that an eligible child be potentially dependent or have the right to receive support from a parent, regardless of whether that parent had actually lived up to his duty. (App. D at 2 & 7).

The majority's conclusion on this issue came from a partial reading of legislative history.[2/] For unexplained reasons,

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2/ In amending the Social Security Act in 1965 to establish the disputed child's insurance provisions, the Senate Report described the Act as a "national program that is intended to pay benefits to replace the support lost by a child when his father . . . dies . . . ." S. Rep. No. 404, 89th Cong., 1st Sess. 1965 U.S. Code Cong. & Adm'n News, p. 2050, quoted in App. F.

it was not persuaded by the contrary assertion of the legislatively more crucial House-Senate Conference Committee Report, cited by this Court in Jimenez,[3/] which stated that benefits were intended "if the father was supporting the child or had a legal obligation to do so."[4/]

Appellant submits that this more significant congressional history, when read in conjunction with the entire Social Security Act, requires adherence to appellant's interpretation. At the very least, however, a substantial question is raised as to the actual meaning of these portions of the Social Security Act. This apparent clash of Congressional history should be resolved by this Court, especially in light of the humanitarian nature of the Act and the adverse impact which the district court's assertedly erroneous decision is having upon the disadvantaged class of illegitimate children.

B. No Legitimate Basis Exists for the Social Security Act's Discrimination Against Illegitimate Children

At the core of the district court's decision in upholding the constitutionality of the additional burden on illegitimate children was the notion that the Social Security Administration could fairly require proof of dependency from those more likely not to have actually been dependent, i.e., appellant's class of illegitimate children, while not requiring the same from groups

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3/ 417 U.S. at 634 n.2.

4/ House-Senate Conference Comm. Rep. on 1965 Amendments to Social Security Act, 111 Cong. Record 18387 (July 27, 1965). See App. F. The court also chose to ignore the similar thrust of the 1965 Report of the Advisory Council on Social Security which also referred to "an obligation to support" rather than actually received support. See Report of the Advisory Council on Social Security. The Status of the Social Security Program and Recommendations for Its Improvement 67 (Washington, D.C., 1965)(App. F).

more likely to have actually been dependent, e.g., all legitimate children.[5/] Accepting arguendo the court's insistence upon actual dependency as being an objective of the Act,[6/] appellant submits that there is no basis, compelling or even of a lesser stature, for the court's assumptions which led to the above reasoning. The court failed to adequately explain why illegitimate children must shoulder this extra burden while similarly situated legitimate children need not.

Although the court cited no hard evidence for its generalized assumptions, the most relevant statistical study known to counsel for appellant fails to support this notion. That study showed that 81.7% of the absent fathers of legitimate AFDC children failed to support their children, while 89.8% of the absent fathers of illegitimate AFDC children did likewise.[7/] This 8% difference

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5/ Proof of paternity, as opposed to dependency, is not at issue in this case. While appellant acknowledges that problems of proof of paternity might justify extra burdens upon illegitimates, see, e.g., Gomez v. Perez, 409 U.S. 535, 538 (1973), appellant has met the Act's requirement in this respect, see Norton v. Richardson, 352 F.Supp. at 598, and does not challenge its validity.

6/ If appellant's contrary reading of the Act's intent is accurate, the district court's "rational basis" for the Act's discrimination would, of course, evaporate.

7/ See Kaplan, Support from Absent Fathers of Children Receiving Aid to Dependent Children, 1955, U.S. Dept. of H.E.W., Social Security Adm'n, Bureau of Public Assistance at 17, 24, 35 & 39 (Washington 1960) quoted in Watts v. Veneman, 334 F.Supp. 482, 487 n.6 (D.D.C. 1971), aff'd in part, r'v'd in part, 476 F.2d 529 (D.C. Cir. 1973).

hardly seems sufficiently significant to buttress a decision to deny benefits to all illegitimate children in appellant's class.

The statutory structure presented in this case is extremely similar to that recently encountered by this Court in Frontiero v. Richardson, 411 U.S. 677 (1973). In Frontiero, male uniformed services members were entitled to claim their spouses as dependents for purposes of obtaining fringe benefits without proof of actual dependency, while female uniformed service members were forced to prove actual dependency. Thus, a male could get fringe benefits for a spouse even though that spouse was not dependent on him, while similarly situated female service members could not. This form of discrimination was ruled unconstitutional. The analogy to this case seems complete.

Appellant submits that it denies him and his class of illegitimate children fundamental fairness for Congress to permit legitimate children to receive child's insurance benefits even if they had not actually been dependent on their deceased fathers, while denying this same right to these illegitimate children. Indeed, the court's ruling has ironically singled out the class most in need of social security assistance--illegitimates whose fathers have failed to support them[8/] --and compounded their misfortune by refusing support after their fathers' deaths. Once again illegitimate children have been short-changed.

8/ As is the general rule throughout the nation, see Bridges v. Secretary of H.E.W., C.C.H. Unemployment Ins. Rptr. ¶16,480, p. 2499-463 (E.D.N.Y. Nov. 24, 1971), father in Maryland have a duty to support their illegitimate children. See Md. Code Ann., Art. 27, §88(b); Art. 16, §66A.

C. Discrimination Against Illegitimate Children Must be Given Strict Judicial Scrutiny

The district court failed to treat illegitimacy as a suspect class and thereby apply this Court's "strict scrutiny" standard to classifications discriminating against illegitimate children. (App. C at 10 & App. D at 2). Instead, it applied a variant of the "rational basis" approach and repeatedly relied upon Dandridge v. Williams, 397 U.S. 471 (1970), which was specifically rejected in Jimenez.[9/]

Discriminatory classifications against illegitimate children should encounter a most exacting standard of review. Applying the test set forth in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), illegitimate children have surely been subjected to a history of purposeful unequal treatment and have been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id.

This Court has, of course, hinted that illegitimacy is to be treated as a suspect criterion. See Weber v. Aetna Casualty & Surety Co., 406 U.S. at 176 n.14 (1972); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 60 (concurring opinion); id. at 108 (dissenting opinion); Sugarman v. Dougall, 413 U.S. 634, 657 (1973)(dissenting opinion); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

Because of the apparent decisional difficulties presented by the instant case, an accurate application of the proper equal protection standard could be critical to its outcome. Appellant

9/ Compare 417 U.S. at 632-634 with Norton v. Weinberger (App. C at & App. D at 10 n.5).

submits that because his class is being denied an important right due to a classification over which its members have no control--the status of their birth--the discriminatory classification which grants them rights inferior to those given legitimate children must be subjected to strict constitutional scrutiny.

Because no clear and unequivocal equal protection standard in this area has yet been articulated by this Court, considerable confusion has been encountered among lower courts[10/] and indeed by the majority of the district court in this case. (See App. D at 6 n.7, dissenting opinion). Clarification of the Court's position on this matter is surely needed.[11/]

D. The District Court Erred in Applying The Child's Insurance Statute To Appellant

Appellant preserves his legal assertion that, assuming the constitutional validity of the support or residency requirements of Section 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. §416(h)(3)(C)(ii), the district court nevertheless erred

10/ See, e.g., Miller v. Laird, 349 F.Supp. 1034, 1039-43 (D.D.C. 1972); Griffin v. Richardson, 346 F.Supp. 1226, 1232-34 (D.Md.), aff'd 409 U.S. 1069 (1972).

11/ As a three-judge district court in the District of Columbia recently stated when confronted by this same issue: "It is hoped that the Supreme Court will clarify what has become an increasingly ambigious standard of review applicable to cases such as that now before us." Severance v. Weinberger, 362 F.Supp. 1348, 1352 n.14 (D.D.C. 1973).

in not finding substantial evidence in the record to establish that appellant was supported by or lived with his deceased father. See Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

C. CHRISTOPHER BROWN

341 N. Calvert Street
Baltimore, Maryland 21202
301-685-1112

Attorney for Appellant

March 18, 1975

Supreme Court, U. S.
FILED
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6212

GREGORY B. NORTON, JR., ET AL.,
Appellants,

—v.—

F. DAVID MATHEWS,
Secretary of Health, Education and Welfare,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED MARCH 19, 1975
JURISDICTION POSTPONED JUNE 30, 1975

In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 6, 1971—Social Security Administration Hearing Examiner's Decision rendered.

January 19, 1972—Action of Appeals Council on Request for Review filed.

March 17, 1972—Plaintiffs' Complaint filed.

March 17, 1972—Plaintiffs' Application for Convening of Three-Judge Court filed.

June 19, 1972—Plaintiffs' Motion for Certification as a Class Action filed.

June 21, 1972—Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment filed.

July 3, 1972—Plaintiffs' Motion for Preliminary Injunction and Summary Judgment filed.

December 22, 1972—Memorandum Opinion of District Court (single judge) filed.

December 22, 1972—Judgment of District Court (single judge) entering summary judgment for defendant on non-constitutional issue filed.

December 22, 1972—Notification and Request for Designation of Three-Judge Court filed.

December 29, 1972—Designation of Three-Judge Court filed.

March 23, 1973—Hearing held on all pending motions before three-judge court.

September 14, 1973—Opinion of District Court (three judges) filed.

September 27, 1973—Order of District Court (three judges) granting motion of defendant for summary judgment and denying motion of plaintiff for summary judgment filed.

October 5, 1973—Notice of Appeal of Plaintiffs to the Supreme Court filed.

July 24, 1974—Attested copy of Order of the Supreme Court vacating the judgment of the district court and remanding for further consideration filed.

September 20, 1974—Hearing held before District Court (three judges) regarding remand from Supreme Court.

February 28, 1975—Majority Opinion of District Court (three judges) and Dissenting Opinion filed.

February 28, 1975—Order of District Court (three judges) filed, denying plaintiffs' motion for summary judgment, granting defendant's motion for summary judgment, dismissing case, and entering judgment in favor of defendant.

March 17, 1975—Notice of Appeal of Plaintiffs to the Supreme Court filed.

June 30, 1975—Orders of Supreme Court filed granting motion for leave to proceed *in forma pauperis* and postponing further consideration of the question of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, MARIAN B. CHILES, 308 East Lorraine Avenue, Baltimore, Maryland 21218, Individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

ELLIOT RICHARDSON, Secretary, Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, D. C. 20201, Serve by certified mail pursuant to 28 U.S.C. § 1391(e), Individually and in his official capacity, DEFENDANT

COMPLAINT

For Declaratory and Injunctive Relief
and Relief in the Nature of Mandamus

I.

Introduction

In this complaint plaintiff, an illegitimate minor child suing by his next of friend and on behalf of a class of all similarly situated persons, seeks an order from this court adjudging Section 216(h)(3)(A)(ii) of the Social Security Act, 42 U.S.C. § 416(h)(3)(A)(ii), to be invalid in that it arbitrarily discriminates against illegitimate children. Alternatively, plaintiff contends that he has nevertheless met the statutory criteria of his section and should be deemed eligible for child's insurance benefits under the Act.

The challenged statutory provision governs the dispersal of federal Social Security survivors insurance benefits. It provides that certain illegitimate children must, in addition to establishing their fathers' paternity, prove that their fathers contributed to their support or lived

with them, matter not required by he Act to be met by legitimate children. Because plainiff failed to establish to the administrative tribual's satisfaction that he was supported by his father, he was ruled ineligible for child's insurance benefits.

In addition to his statutory argument, plaintiff and his class contend that this discriminatory provision denies them due process of law and equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution. They ask for declaratory and injunctive relief and the issuance of an order in the nature of mandamus against defendant, the Secretary of Health, Education, and Welfare, requiring payment of all monies due.

II.

Jurisdiction

Jurisdiction is conferred on this court by any of several independent federal statutory bases:

1. Jurisdiction is conferred on this court by 28 U.S.C. § 1361 which grants this court original jurisdiction in any action in the nature of mandamus to compel an officer of the United States or agency thereof to perform a duty owed to the plaintiff.

2. Jurisdiction is alternatively conferred on this court by 28 U.S.C. § 1331 which grants this court original jurisdiction in a civil action raising a federal question wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Jurisdiction is alternatively conferred on this court by Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which grants this court original jurisdiction to review a final administrative decision by the Department of Health, Education, and Welfare denying certain benefits under the Social Security Act.

4. Jurisdiction is alternatively conferred on this court by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §§ 701-4, which creates jurisdiction in this court to review the final adverse action of the federal agency involved in this complaint.

III.

Three-Judge Court

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 since plaintiff seeks an injunction to restrain defendant, a federal officer, from the enforcement, operation, and execution of an Act of Congress on the ground that it is contrary to the Constitution of the United States.

IV.

Plaintiff

The named plaintiff, Gregory B. Norton, Jr., suing by his next of friend and grandmother, Marian B. Chiles, resides with Mrs. Chiles at 308 East Lorraine Avenue, Baltimore, Maryland. Gregory Norton is presently eight (8) years of age, having been born on February 10, 1964. He and his guardian are residents of Maryland and citizens of the United States.

V.

Defendant

Defendant, Elliot Richardson, is the Secretary of the Department of Health, Education, and Welfare of the United States Government. He is charged under the Social Security Act with the primary responsibility for the administration of the Social Security Administration and the execution of its laws, including 42 U.S.C. § 416(h)(3) which is challenged herein as being in conflict with the Constitution of the United States.

VI.

Class Action

The named plaintiff brings this action on his own behalf and, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), on behalf of all other persons similarly situated. Plain-

tiffs' class is composed of all persons otherwise eligible for Social Security child's insurance benefits but for that fact that they are illegitimate by birth and are unable to meet the eligibility requirements of 42 U.S.C. § 416 (h) (3) (A) (ii) relating to support and residence. This class is so numerous that joinder of all members is impossible and impracticable. There are questions of law and fact common to the class. The named plaintiffs will fairly and adequately protect the interests of the class. The defendant and his agents have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VII.

Factual Allegations

1. Gregory B. Norton, Sr., the natural father of plaintiff Gregory B. Norton, Jr., was born March 9, 1947.

2. Mr. Norton entered the United States Army on February 28, 1965.

3. On May 19, 1966, Mr. Norton, at age nineteen (19), was killed while on duty in Vietnam as a result of a metallic fragment wound in his head that was incurred when a hostile booby trap detonated during military operations.

4. Mr. Norton's earnings while in the military service were sufficient to entitle him to Social Security benefit coverage under Title II of the Social Security Act.

5. Gregory B. Norton, Jr., the plaintiff, was born at Johns Hopkins Hospital in Baltimore, Maryland on February 10, 1964 to Laurie Marie Brown, then aged fourteen (14), and Gregory B. Norton, Sr., then aged sixteen (16).

6. Gregory's parents were never married.

7. Since his birth, Gregory has been in the care of Mrs. Marian B. Chiles, Laurie Marie Brown's mother, who presently resides at 308 East Lorraine Avenue, Baltimore, Maryland.

8. Gregory, Jr., is his father's only natural child. Mr. Norton was never married.

9. Gregory Norton, Sr., orally admitted to being his son's father.

10. Prior to going into the Army, Mr. Norton was an unemployed secondary school student who lived with his parents. He accordingly was unable to contribute a significant amount of money to his son's support. He did contribute a small amount of money, baby clothes, and other infant equipment.

11. Mr. Norton did work briefly at a bowling alley in 1964.

12. After Mr. Norton went into the service he wrote home for Gregory's birth certificate and other items needed for him to make out an allotment and insurance for the child. The birth certificate was found in his personal effects after his death. An allotment or insurance for the child was never made out.

13. Plaintiff's grandmother, Mrs. Marian Chiles, on September 2, 1969 filed an application on Gregory's behalf for child's insurance benefits based on the earnings of his deceased father. If granted, Gregory would have been enttiled to a monthly benefit amount of $44.00.

14. This application was denied because the claimants had failed to prove that Mr. Norton had been living with or contributing to the support of his son, a requirement for benefits set forth by Section 216(h)(3)(A)(ii) of the Act.

15. Upon Mrs. Chiles' request for reconsideration, this original determination of ineligibility was affirmed on May 14, 1970.

16. Mrs. Chiles next requested a formal hearing on her application for child's insurance benefits for Gregory. The Social Security Administration hearing examiner held in his opinion of August 6, 1971 that Gregory B. Norton, Sr., was indeed the father of Gregory, Jr., but that there was:

> insufficient evidence that [he] . . . "supported" Gregory B. Norton, Jr. and the evidence indicates that the wage earner did not, while in the service, ob-

> tain an allotment of soldier's pay for the purpose of supporting the child . . . .

Because the hearing examiner also found that Mr. Norton had not lived with his son at the time of his death, he ruled that the requirements of Section 216(h)(3)(A)(ii) had not been met and that Gregory was therefore not entitled to child's insurance benefits. (See Exhibit A, attached.)

17. Mrs. Chiles' request for a review of this decision was denied on January 19, 1972 by the Appeals Council of the Social Security Administration. (See Exhibit B, attached.)

18. If able to establish eligibility for child's insurance benefits, Gregory Norton, Jr., would now be receiving a monthly sum of $70.40, the present minimum benefit amount.

19. Gregory Norton, Jr., has been determined eligible for and is now receiving Veterans Administration benefits.

20. Gregory Norton, Jr., has at no time received any Social Security child's insurance benefits.

21. Because of defendant's refusal to grant him benefits, Gregory Norton, Jr., is presently suffering irreparable harm. His damage exceeds $10,000, in sum or value, exclusive of interest.

VIII.

First Cause of Action

1. The Social Security Act sets forth four ways in which illegitimate children can qualify to receive their deceased parent's survivors insurance benefits. First, such child is eligible if under the intestate succession law of the state in which the child is domiciled, the child could inherit the deceased's personal property, 42 U.S.C. § 416(h)(2)(A). Second, the child is eligible if his or her parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment . . . would have been a valid marriage." 42 U.S.C. § 416(h)(2)(B). Third, an illegitimate child can qualify if the child's paternity were established by a

written acknowledgment, court decree, or court support order. 42 U.S.C. § 416(h)(3)(A)(i).

2. Not being able to meet any of these tests, plaintiff sought to qualify under the fourth, 42 U.S.C. § 416(h)(3)(A)(ii), which requires establishing "by evidence satisfactory to the Secretary" that the deceased wage earner was:

> the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred; . . .

3. Plaintiff contends that the proper application of this statutory requirement to the facts of his case requires a finding that he has met the Act's requirements and is eligible for child's insurance benefits.

4. The Social Security Administration was accordingly in error in holding that there is insufficient evidence to establish plaintiff's eligibility under the terms of § 416(h)(3)(A)(ii).

IX.

Second Cause of Action

1. The provisions of 42 U.S.C. § 416(h)(3)(A)(ii) impose an extra condition of eligibility upon plaintiff's class of illegitimate children that is not required of other children under the Act.

2. This subsection therefore creates two classes of insured wage earners' children: (1) those illegitimate children who can qualify for benefits in no other way than to rely on section 416(h)(3)(A)(ii) and who are unable to meet the "living with" or "contributing to" criteria and (2) those children, both legitimate and illegitimate, who are not required to prove that their father lived with them or supported them and are thereby able to receive child's insurance benefits.

3. No adequate governmental justification exists for this arbitrary scheme which discriminates against certain illegitimate children. It accordingly is invalid as a denial of equal protection of the laws as guaranteed by the Fifth Amendment of the United States Constitution.

X.

Third Cause of Action

1. By denying child's insurance benefits to plaintiff and his class, Section 216(h)(3)(A)(ii) of the Social Security Act deprives them of valuable rights due to actions of their parents over which these children have no control.

2. This arbitrary and capricious denial of benefits constitutes a denial of due process and accordingly is unconstitutional under the Due Process Clause of the Fifth Amendment of the United States Constitution.

XI.

Prayer for Relief

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all others similarly situated that this Honorable Court:

1. Convene a three-judge court to hear this case pursuant to 28 U.S.C. §§ 2282 and 2284.

2. Certify this action as a class action pursuant to Fed. R. Civ. P. 23(c)(1).

3. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202, declaring Section 216(h)(3)(A)(ii) of the Social Security Act invalid, insofar as it discriminates against illegitimate children, on the ground that it is violative of the Fifth Amendment to the United States Constitution.

4. Enter preliminary and permanent injunctions pursuant to Fed. R. Civ. P. 65 and a writ in the nature of mandamus enjoining defendant, his successors in office, agents, employees, and all other persons in active concert and participation with them from refusing to grant plaintiff and his class child's insurance benefits merely because they are illegitimate and unable to establish that their father lived with or supported them.

5. Order defendant, his successors in office, agents, and employees to notify promptly by first class mail at their last known address all persons who have been denied

child's insurance benefits due to Section 216(h)(3)(A)(ii) that they are now eligible for such benefits and may reapply.

6. Grant plaintiffs and all those similarly situated such additional or alternative relief, including payment of all monies wrongfully withheld, as may seem to this court to be just and proper.

Respectfully submitted,

/s/ C. Christopher Brown
C. CHRISTOPHER BROWN
Law Reform Unit
Legal Aid Bureau, Inc.
341 North Calvert Street
Baltimore, Maryland 21202
Telephone: 685-1112

/s/ Michael Berman
MICHAEL BERMAN
Legal Aid Bureau, Inc.
341 North Calvert Street
Baltimore, Maryland 21202
Telephone: 539-5340
Attorneys for Plaintiffs

STATE OF MARYLAND, ss:

Marian B. Chiles, being duly sworn, does depose and say that she is the next of friend of the named plaintiff herein, that she has read the foregoing complaint and knows the contents thereof, and that they are true to the best of her knowledge and belief.

/s/ Marian B. Chiles
MARIAN B. CHILES

Subscribed and Sworn to before me this 15th day of March, 1972.

/s/ William L. Fuller
Notary Public

My Commission Expires: July 1, 1974

EXHIBIT A

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

NOTICE OF DECISION

PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision of the hearing examiner, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below.

You, or your representative, may file the request for review at the nearest office of the Social Security Administration, or you may file the request for review with the hearing examiner, or with the Appeals Council.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under sections 205(g) and 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing examiner's decision mailed to the claimant and representative Michael Berman, Esq., 341 N. Calvert Street, Baltimore, Maryland 21202 on August 6, 1971.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING EXAMINER'S DECISION

In the case of

Marion B. Chiles, Guardian
on behalf of Gregory B. Norton, Jr.
(Claimant)

Gregory B. Norton
(Wage Earner) (Leave blank if same as above)

Claim for

(Child's Insurance Benefits)
Retirement Insurance Benefits

212-48-8660
(Social Security Number)

This case is before the undersigned Hearing Examiner upon request for hearing filed by Marion B. Chiles, guardian of Gregory B. Norton, Jr. The claimant is dissatisfied with the determination made by the Bureau of Retirement and Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare, disallowing Marion B. Chiles' application for Child's Insurance Benefits for Gregory B. Norton, Jr. After appropriate notice, a hearing was held before the undersigned Hearing Examiner on June 7, 1971, at Baltimore, Maryland, with the claimant present and participating. Claimant was represented by Michael Berman, Esq. Also present and participating was Edward D. Green, a contact representative for the Veterans Administration.

The claimant filed an application for Child's Insurance Benefits on behalf of Gregory B. Norton, Jr. on September 2, 1969. She was notified by letter dated October 22, 1969 that the requirement of the Social Security Act

that the father must have acknowledged in writing or have been ordered by court to contribute to the childs support or have been judicially declared to be the child's father and as living with the child or contributing to his support, had not been met. Claimant requested reconsideration by the Social Security Administration and was thereafter notified by letter dated May 14, 1970 that the original determination on her application for Child's Insurance Benefits was affirmed. The request for hearing was filed on November 12, 1970.

Procedural Matters

An objection to the admission of Exhibit 17 was made but that objection was overruled because Mrs. Chiles was present to testify to correct any errors which might appear in that statement. There was an objection to Exhibit 16 and the objection was granted and exhibit is hereby removed because it amounts to an administrative summary of the processing of this case. An objection was raised to Exhibit 11 but it was also overruled because of the presence at the hearing of Mr. Green, the Veterans Administration contact representative.

Statement of Issues and Applicable Law

The general issue before the Hearing Examiner is whether or not Gregory B. Norton, Jr. is entitled to surviving Child's Insurance Benefits on the earnings of the deceased wage earner and whether the deceased wage earner was the biological father of this child and that the child was living with or being supported by the father at the time of the father's death. Section 216(h)(3) of the Act, as here pertinent, provides that an illegitimate child under certain conditions meets the definition of "child" even though he neither has any inheritance rights from the wage earner under the state laws nor is deemed to be wage earner's child by virtue of an invalid ceremonial marriage.

Section 216(h)(3)(C) of the Social Security Act provides, as is pertinent here, that the applicant shall be

determined to be the child of that individual if such insured individual is shown by evidence satisfactory to the Social Security Act to have been the father of the applicant and such insured individual also was living with or contributing to the support of the applicant at the time of such wage earner's death.

Summary of the Evidence

Gregory B. Norton was born March 9, 1947. He went into the military service February 28, 1965 and died in Viet Nam on May 19, 1966. Gregory B. Norton, Jr. was born February 10, 1964 in Baltimore City at the Johns Hopkins Hospital to Laurie Marie Brown (age 14) and Gregory Bernard Norton (age 16). The original birth certificate showed the name of the father of the child to be Gregory B. Brown, but the name Brown was later stricken out and the name Norton placed thereon. (Exhibit 13)

The child Gregory B. Norton, Jr. has been in the care of Marion B. Chiles, the mother of Laurie Brown, since birth. Mrs. Chiles testified how before the birth of the child, the father of the child, Gregory B. Norton, who was unemployed and lived with his parents, admitted being the father of the child which was to be born to Laurie Brown. She indicated that no support was given the first year but gifts of clothes and baby bottles, etc. were given at the time of the birth. At the time of the birth, Gregory was a student, age 16 and the mother of the child was only 14. Mrs. Chiles testified that after Gregory B. Norton went into the army he wrote home for the birth certificate of the child and other things he needed so that he could make out an allotment and insurance for the child.

Edward D. Green, a Contact Representative of the Veterans Administration, read into the record a number of depositions which the Veterans Administration had previously taken. Essentially and briefly, the deposition of Laurie Brown Edwards, the mother of the child, indicated that at one time, claimant gave her $6 and some clothes.

He visited her at the hospital. She indicated that she went to the State's Attorney's office in the Court House about support for the child. They told her that when Gregory B. Norton was home from the service, he should come down for an interview. When Gregory B. Norton came home, he never went down for the interview. As to support of the child, she indicated Gregory B. Norton did not make an allotment although he asked for the birth certificate and it was sent to him but nothing came of it. Mr. James Robertson was previously married to Marion B. Chiles. He indicated Gregory Norton admitted being the father of the child and that Gregory brought clothes, bottles, nipples, etc. Mrs. Maith, the mother of Gregory B. Norton, said that he lived with her before he went into the service and that the mother of the child had not asked for help and that there was no contact until after the death of her son. She did say that her son said, "I am going to make out an allotment for the baby." The birth certificate was found in her son's personal affects. Mrs. Maith was the full beneficiary of the insurance policy. The deposition of Mrs. Mary Evans was also read and it indicated that she tried to find the address of Gregory, Jr. and the mother of the child so that she could contact them on behalf of Gregory B. Norton so that he would have something to show to the military that the child was his son.

An application for compensation for pension for Gregory B. Norton, Jr. from the Veterans Administration dated September 18, 1969, is part of the record. An administrative decision shows the Veterans Administration conclusion to be as follows:

> "It is determined that the child, Gregory B. Norton, Jr. is recognized by the Veterans Administration as the illegitimate child of the veteran and is entitled to death benefits based on the service of the veteran." (Exhibits 10, 11, & 12)

The certificate of live birth dated February 10, 1964, shows a Gregory Bernard Norton, Jr. was born to Laurie Marie Brown and Gregory Bernard Brown. The name

Brown was replaced with Norton. A Health, Education, and Welfare form shows that Gregory B. Norton last worked at the Park Heights Bowling Alley in 1964 and was in the Maryland Training School under a Maryland State training program. (Exhibit 14)

Evaluation of the Evidence

The Hearing Examiner agrees with the Veterans Administration administrative determination that there was sufficient evidence to indicate that Gregory B. Norton is the father of the child, Gregory B. Norton, Jr. The child was born on February 10, 1964 and almost from birth was in the care and custody of Marion B. Chiles. Clearly the evidence indicates that the wage earner was not "living with" either the mother of the child nor the child. The crucial period in this case is the support from the period of February 10, 1964, the birth of the child, through May 19, 1966, the date of the wage earner's death. At best, there is evidence from Laurie Brown in the form of a deposition that the wage earner gave $6 on two occasions and from other sources that he gave bottles, diapers, etc. at the time of the birth of the child. Further, the Hearing Examiner understands full well that the wage earner was a young boy and was not regularly gainfully employed during that period with exception of one slight reference to some work at the bowling lane. His earnings record shows that he earned $212.33 in 1964. There is insufficient objective evidence to indicate that the wage earner "supported" the child prior to going into the service. On February 28, 1965, approximately 1 year after the birth of the baby, claimant went into the service. The Hearing Examiner acknowledges that the wage earner in a letter asked for the birth certificate of the child and that record of birth was found with his personal affects. No allotment of support was made by Gregory B. Norton on behalf of Gregory B. Norton, Jr. prior to that date of his death, May 19, 1966. Further, the criteria of the Veterans Administration which is different from the Social Security Administra-

tion is not binding on the Social Security Administration. The Social Security Administration requires a proof of relationship as well as dependency and/or support to be established for Social Security benefits purposes. While the administrative determination of the Veterans Administration is not binding on the Social Security Administration, the evidence they developed is supportive of the Hearing Examiner's decision that Gregory B. Norton is the father of the child in question but is insufficient to establish a "living with or support" requirement of the Social Security Act.

Findings of Facts

The Hearing Examiner has considered all the evidence in this case, and based upon the preponderance of the credible evidence, makes the following specific findings:

1. That Gregory B. Norton is the father of Gregory B. Norton, Jr., born February 10, 1964.
2. That prior to going into the service, there is insufficient evidence that the wage earner, Gregory B. Norton, "supported" Gregory B. Norton, Jr. and the evidence indicates that the wage earner did not, while in the service, obtain an allotment of soldier's pay for the purpose of supporting the child aforementioned.
3. That Gregory B. Norton did not live with the child at the time of the wage earner's death so as to meet the dependency requirements within the meaning of Section 216(h)(3)(C) of the Social Security Act.

Decision

It is the decision of the Hearing Examiner that Gregory B. Norton, Jr. is the natural child of Gregory B. Norton, the wage earner, within the meaning of the Section 216 (h)(3) of the Social Security Act, but there is insufficient evidence of record to establish that other requirements of the Social Security Act were met so as to entitle

Gregory B. Norton, Jr. to benefits. Therefore, it is the decision of the Hearing Examiner that the child is not entitled to Child's Insurance Benefits on the wage record of Gregory B. Norton.

/s/ J. Robert Brown
J. ROBERT BROWN
Hearing Examiner
Bureau of Hearings and Appeals
707 N. Calvert St., Room 500
Baltimore, Maryland 21202

Date: August 6, 1971

APPENDIX B

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013

January 19, 1972

Refer To: HA-C
212-48-8660

Bureau of
Hearing and Appeals

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mrs. Marion B. Chiles
o/b/o Gregory B. Norton
308 East Lorraine Avenue
Baltimore, Maryland 21218

Dear Mrs. Chiles:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed.

The Appeals Council has concluded that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial

district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended (section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

Jackson C. Smith
Member, Appeals Council

cc:
Michael Berman, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

v.

ELLIOT RICHARDSON, Secretary Department of Health, Education and Welfare, Individually and in his official capacity

C. Christopher Brown and Michael Berman, of Baltimore, Maryland, for plaintiff.

Harlington Wood, Jr., Assistant Attorney General, Harland F. Leathers and Bruce E. Titus, of Washington, D.C., George Beall, United States Attorney, and Jeffrey White, Assistant United States Attorney, of Baltimore, Maryland, for defendant.

Filed: December 22, 1972.

Blair, District Judge.

MEMORANDUM OPINION

This case involves an attempt by plaintiff, Gregory B. Norton, Jr., to establish his right to receive child's insurance benefits under the Social Security Act, 42 U.S.C. § 402(d) after the death of his father, Gregory B. Norton, Sr. Benefits have been denied him by the Secretary of Health, Education and Welfare who found that he failed to meet the requirements of 42 U.S.C. § 416 (h)(3)(c)(ii). This section requires that certain illegitimate children, to qualify under the Act as a child of the deceased wage earner, must prove, in addition to paternity, that they were living with or supported by the wage earner on the date of his death. Although Gregory proved he was the son of Gregory Norton, Sr.,

he failed to convince the Secretary that he had been living with or supported by his father when his father died. Two theories have been advanced in support of Gregory's right to receive benefits. The first is that the Secretary's decision rests on an incorrect interpretation of § 416(h)(3)(c)(ii) and is in error.[1] The second and alternative theory is that if the Secretary's interpretation is correct, § 416(h)(3)(c)(ii) should be held unconstitutional, its operation enjoined, and the Secretary directed by mandamus-like writ to commence payments.[2] Because the latter theory seeks an injunction against the enforcement of a federal statute on constitutional grounds, plaintiff has requested the convocation of a three-judge court. Plaintiff also seeks certification of the case as a class action and a preliminary injunction should the issue of the constitutionality of § 416(h)(3)(c)(ii) be reached.

Both sides have asked for summary disposition of the case, the pertinent facts being agreed upon. Defendant has moved for summary judgment or dismissal for failure to state a cause of action; plaintiff has responded with his own motion for summary judgment. As a preliminary matter, it must be determined which issues, if any, may be resolved by a single judge and which must be referred to a three-judge court for determination. Defendant contends that a three-judge court is not required, there being no substantial constitutional issue, and that judgment should be entered in favor of the Secretary on both claims by this court sitting as a single judge. Plaintiff counters that a three-judge court is required unless this court in its single judge capacity enters judgment in his favor, either because the Secretary's decision was wrong or the statute is unquestionably unconstitutional.

---

[1] Jurisdiction for judicial review of the decisions of the Secretary of H.E.W. is provided by 42 U.S.C. § 405(g).

[2] Jurisdiction here is based on the general federal question provision of 28 U.S.C. § 1331 and on 28 U.S.C. § 1361, providing jurisdiction in mandamus actions against officers of the United States or its agencies.

The review of a decision of the Secrtary of H.E.W. is normally by a single judge court. Plaintiff is willing for this court to review the Secrtary's decision, but only if judgment will be awarded plaintiff and asks that the three-judge court decide the claim if judgment is not to be for plaintiff. The court, however, disagrees with plaintiff that the three-judge court should consider this issue. The review of the Secretary's decision, being an alternative to deciding a constitutional question, must be resolved before the constitutional claim is reached. *Wyman* v. *Rothstein*, 398 U.S. 275 (1970). Although the three-judge court would have pendent jurisdiction over this claim,[3] the recent authority is that the single judge, and not the three-judge court, should decide the non-constitutional claim. In *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970), the Supreme Court indicated that the preferred procedure for a three-judge court presented with such a claim "may well have been to remand to the single district judge for findings and determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court." Three-judge courts after *Rosado* have followed this suggestion and remanded the non-constitutional claim to the single judge for decision prior to their consideration of the constitutional issue. *Doe* v. *Gillman*, 347 F. Supp. 483 (N.D. Iowa 1972); *Hubert* v. *Saucier*, 347 F. Supp. 152 (N.D. Ga. 1972); *Linnane* v. *Betit*, 331 F. Supp. 868 (D. Vermont 1971);

[3] *Turner* v. *Fouche*, 396 U.S. 347, 354 (1970); *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 80-85 (1960); *Zemel* v. *Rusk*, 381 U.S. 1, 5-7 (1965); *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968); *Sterling* v. *Constantin*, 287 U.S. 378, 393-4 (1932). But, *cf. Perez* v. *Ledesma*, 401 U.S. 83, 86-7 (1971); *New York Central Securities Corp.* v. *U.S.*, 287 U.S. 12, 28-29 (1932); *Powell* v. *U.S.*, 300 U.S. 276, 289-90 (1937); *Pittsburgh & W.Va. Ry. Co.* v. *U.S.*, 281 U.S. 479, 488 (1930); *Hobson* v. *Hansen*, 256 F.Supp. 18, 21 (D.C.Cir. 1969); *Landry* v. *Daley*, 280 F.Supp. 929, 937 (N.D.Ill. 1967); *Jehovah's Witnesses in State of Wash.* v. *King County Hosp.*, 273 F.Supp. 488, 496-7 (W.D.Wash. 1967), *aff'd.* 390 U.S. 598 (1968).

Saddler v. *Winstead*, 327 F. Supp. 568 (N.D. Miss. 1971); *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E.D. Va. 1971); *Doe* v. *Hursch*, 337 F. Supp. 614, 616 (D. Minn. 1970). To this court there is no reason for the single judge to first send the non-constitutional claim to the three-judge court before deciding it. *Bryant* v. *Carlson*, 444 F.2d 353 (9th Cir. 1971), *cert. denied* 404 U.S. 967 (1971); *Kelly* v. *Illinois Bell Tel. Co.*, 325 F.2d 148 (7th Cir. 1963); *Chicago, Diluth & Georgian Bay Transit Co.* v. *Nimms*, 252 F.2d 317 (6th Cir. 1968); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Connecticut Union of Welfare Employees* v. *White*, 55 F.R.D. 481 (D.Conn. 1972). *Contra Weintraub* v. *Hanrahan*, 435 F.2d 461 (7th Cir. 1970); *Fort* v. *Daley*, 431 F.2d 1128 (7th Cir. 1970). In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court. *See, e.g., Kelly* v. *Illinios Bell Tel. Co.*, 325 F.2d 148 (7th Cir. 1963); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972). Sending all claims to the three-judge court requires that the three-judges gather at least to remand, though they may never be required again in the case. *See, e.g., Doe* v. *Hursch*, 337 F. Supp. 614 (D. Minn. 1970). Even if the three-judge court is eventually required because of the single judge's decision, nothing would be more wasteful than having two federal judges re-do the work one judge has already completed when that work involves a claim not required by statute to be decided by a three-judge court. At a time when the burden of three-judge court procedure rests heavily upon the federal judiciary, there is little need to increase that burden with inefficiency. For this reason, the review of the Secretary's decision shall be done by this court alone and shall not be sent to a three-judge court.

In reviewing the Secretary's decision, the court notes that plaintiff does not contest the supporting facts upon which the decision rests. Instead, plaintiff attacks the conclusion drawn from these facts, contending that they

are sufficient to meet the requirement of § 416(h)(3)(c)(ii) that the deceased wage earner have lived with or supported his illegitimate child on the date of his death. The essential facts relevant to § 416(h)(3)(c)(ii) can, therefore, be briefly summarized. Gregory Norton, Jr. was born out of wedlock in 1964 to Gregory Norton, Sr., then 16, and Lauri Marie Brown, then 14. Both Gregory Norton, Sr. and Lauri Marie Brown were high school students living at home. They never married, nor did they ever live together. From the time of his birth to the present, Gregory Norton, Jr. has lived with and been under the care of his maternal grandmother, Mrs. Marion B. Chiles. When Gregory Norton, Jr. was born, Gregory Norton, Sr. apparently contributed $6.00 and some gifts of clothing and other baby habiliments, but never actually undertook the support of the child, being an unemployed student at the time. In February of 1965, Gregory Norton, Sr. entered the Army. He had at this point never lived with his son. On May 19, 1966, at age 19, Gregory Norton, Sr. was killed while serving in Vietnam. Prior to his death, Gregory Norton, Sr. attempted to authorize a child's military allotment which would have provided the child with regular support. Whether because of military red tape or some other reason, on the date of his death he had failed to complete the procedure which would have initiated the allotment payments. While it appears evident that at some point Gregory Norton, Sr. did intend to begin supporting his son, it is undeniable that at the time of his death such support had yet to commence.

Plaintiff does not maintain that § 416(h)(3)(c)(ii) was satisfied by a showing that Gregory Norton, Sr. was living with his son on the date of his death. Being in Vietnam, Gregory Norton, Sr. was obviously not living with Gregory Norton, Jr. and there is absolutely no evidence to suggest that Gregory Norton, Sr. ever attempted or even intended to live with his illegitimate child. Plaintiff's argument is that Gregory Norton, Sr.'s attempt to support his son, though admittedly unsuccessful, was all that had to be proven under a proper reading of the statute for Gregory Norton, Jr. to qualify for benefits

and that, for this reason, the Secretary's conclusion that Gregory Norton, Jr. was not supported by his father on the date of his death is not based on substantial evidence[4] and is erroneous. What plaintiff argues is that an applicant is not disqualified from receiving benefits by § 416(h)(3)(c)(ii) if the deceased did all that could reasonably be expected of him to live with or support the child. In support of this proposition, plaintiff cites numerous cases liberally interpreting § 416(h)(3)(c)(ii) along this line. *See Bridges* v. *Sec. of H.E.W.*, C.C.H. Unemployment Insurance Reports, ¶ 16,480 (E.D.N.Y. 1971); *Crisp* v. *Richardson*, C.C.H. Unemployment Insurance Reports, ¶ 16,612 (W.D.N.C. 1972); *Mobley* v. *Richardson*, C.C.H. Unemployment Insurance Reports, ¶ 16,439 (W.D.N.C. 1971); *Jackson* v. *Richardson*, C.C.H. Unemployment Insurance Reports, ¶ 16,767 (S.D.W.Va. 1972); *Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1969).

While this court agrees that the provisions of the Social Security Act should be liberally construed in favor of coverage, even a liberal construction of § 416(h)(3)(c)(ii) would not extend coverage to Gregory Norton, Jr. under the precedents plaintiff relies on. In each of these cases, there had been some regular and continuous "living with" or "support by" the wage earner which for some unavoidable reason was interrupted on the date of the wage earner's death. For example, in *Bridges* v. *Secretary of H.E.W.*, C.C.H. Unemployment Insurance Reports, ¶ 16,480 (E.D.N.Y. 1971) the wage earner had been living with the mother and his illegitimate children in New York and had supported them from his wages. Tuberculosis first hospitalized him and then caused him to spend large amounts of his time in North Carolina caring for his health. He was forced to live on a Veterans Administration pension. Despite all of this, he regularly visited the mother and children. He died in North Carolina four months after having spent Thanks-

[4] 42 U.S.C. § 405(g) provides that the Secretary's finding of any fact—i.e. whether Gregory Norton, Jr. was supported by his father on the date of his death—is conclusive if supported by "substantial evidence."

giving with the family. The court ruled that the separation was caused by circumstances beyond the wage earner's control and that his children would not, for this reason, be barred from receiving benefits.

There is nothing in the record to indicate that Gregory Norton, Sr. had regularly or continuously lived with or supported his son and was prevented from so doing on the date of his death by circumstances beyond his control. The only evidence of any support at all is the small gifts provided when the baby was born and the attempt to establish a military pay allotment. When faced with evidence of only sporadic and insignificant contributions of support, the court found in *Johnson* v. *Finch*, C.C.H. Unemployment Insurance Reports, ¶ 16,646 (N.D.Tex. 1972) that the wage earner had not been supporting his illegitimate child, as contemplated by the statute. It follows *a fortiori* that a single, insignificant contribution does not qualify either. Although plaintiff argues that Gregory Norton, Sr. had done all within his power to support his illegitimate child, this is a conclusion the court cannot reach. Gregory Norton, Sr. made no real overture of support until he attempted to take out the military pay allotment and evidence is lacking to support the diligence of his effort in that regard. All that can be said conclusively about his attempt to support his son is that it failed and his support never began. An unsuccessful attempt to do an act required by the Social Security Act is not compliance. *Moore* v. *Richardson*, 345 F. Supp. 75 (W.D.Va. 1972). The Secretary's decision must, therefore, be affirmed.

Having found the Secretary's decision to be correct, the court must now consider plaintiff's constitutional claim. Plaintiff contends that § 416(h)(3)(c)(ii) violates the equal protection guarantee implicit in the Fifth Amendment of the Constitution by impermissibly discriminating against a certain class of illegitimate children. On the basis of the Supreme Court's decision in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the court is of the opinion that this claim raises a substantial constitutional issue which must, under 28

U.S.C. § 2282, be resolved by a district court of three judges. This court shall request the Chief Judge of this Circuit to convene a three-judge court to decide the constitutionality of the challenged statute. The request for certification as a class action and for a preliminary injunction shall be referred to the three-judge court.

Accordingly, the Secretary is entitled to summary judgment in his favor on the issue of whether his decision that Gregory Norton, Jr. was not entitled to child's insurance benefits was supported by substantial evidence.

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

v.

ELLIOT RICHARDSON, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

JUDGMENT

In accordance with the court's opinion of even date finding that the decision of the Secretary denying child's insurance benefits to the plaintiff was supported by substantial evidence, summary judgment on that issue is hereby entered in favor of the Secretary this 22nd day of December, 1972.

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

v.

CASPAR WEINBERGER, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

C. Christopher Brown and Michael Berman, of Baltimore, Maryland, for plaintiffs.

Harlington Wood, Jr., Assistant Attorney General, Harland F. Leathers and Bruce E. Titus, Attorneys, Department of Justice, Washington, D. C.; George Beall, United States Attorney for the District of Maryland, and Jeffrey White, Assistant United States Attorney, of Baltimore, Maryland, for defendant.

Before Winter, Circuit Judge, and Murray and Blair, District Judges.

Filed: Sept. 14, 1973

OPINION

Blair, District Judge.

Gregory Norton, Jr., on behalf of himself and all others similarly situated, challenges the constitutionality of § 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. § 416(h)(3)(C)(ii) and seeks to restrain its enforcement. This three judge court has been convened to decide the constitutional question. The case is before the court on cross-motions for summary judgment, the essential facts not being in dispute.

To understand the issues involved, it is important at the outset to examine the pertinent statutory framework.[1] Under the Social Security Act, the child of a deceased wage earner who was dependent on the wage earner at the time of the wage earner's death is entitled to child's insurance benefits. 42 U.S.C. § 402(d)(1)(C)(ii). A legitimate child, being the wage earner's offspring and presumed dependent, automatically qualifies for benefits. 42 U.S.C. §§ 416(e)(1) and 402(d)(3)(A). An illegitimate child also can receive benefits, but he or she must first qualify under one of several alternative provisions. An illegitimate child who could, under the intestacy law of the wage earner's domicile, inherit the wage earner's personality is eligible for benefits upon proof that the wage earner was the parent and that at the time of death, the wage earner lived with or contributed to the support of the child. 42 U.S.C. §§ 416(h)(2)(A), 416(e)(1), and 402(d)(3). An illegitimate who is the child of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed is entitled to receive benefits. 42 U.S.C. §§ 416(h)(2)(B), 416(e)(1) and 402(d)(3). Or, an illegitimate may qualify for benefits if it is shown that the wage earner prior to his death either (1) had acknowledged in writing that the illegitimate child was his son or daughter, (2) had been decreed by a court to be the father of the illegitimate child, or (3) had been ordered by a court to contribute to the support of the illegitimate child because he was the father. 42 U.S.C. §§ 416(h)(3)(C)(i), 416(e)(1) and 402(d)(3). Those illegitimate children unable to provide a written acknowledgment, a paternity decree, or a support order may still qualify for benefits under 42 U.S.C. § 416(h)(3)(C)(ii), the challenged provision, if the wage earner is shown by evidence satisfactory to the Secretary to be the father and the wage earner was living with or contributing to the support of

[1] The pertinent provisions are set out in an appendix. Emphasis has been added to the language directly relevant to the court's explication of the statute.

the illegitimate child at the time of his death. 42 U.S.C. §§ 416(h)(3)(C)(ii), 416(e)(1) and 402(d)(3).

Gregory Norton, Jr., an illegitimate child, sought child's insurance benefits after the death of his reputed father, Gregory Norton, Sr. Not being able to provide a written acknowledgment of paternity and a paternity decree or support order never having been obtained during the lifetime of Gregory Norton, Sr., he was forced to rely on § 416(h)(3)(C)(ii) to establish his right to benefits. He was denied benefits by the Secretary of H.E.W. after the appeal board affirmed the hearing examiner's conclusion that he failed to meet the requirements of § 416(h)(3)(C)(ii). Although the hearing examiner found Gregory Norton, Jr. was the son of Gregory Norton, Sr., he held that Gregory Norton, Sr. was not living with or contributing to the support of his son at the time of his death. Suit was thereafter filed on Gregory Norton, Jr.'s behalf by his maternal grandmother, Marian B. Chiles, in the federal district court. Alternative relief was prayed. Plaintiff asked the court to either rule that the Secretary's decision denying benefits for failure to meet § 416(h)(3)(C)(ii)'s "living with or support by" requirement was incorrect and that Gregory Norton, Jr. had in fact qualified or, if the Secretary's decision was correct, to declare § 416(h)(3)(C)(ii)'s "living with or support by" requirement unconstitutional, enjoin its further enforcement, and direct the Secretary by mandamus-like writ to commence payments.

The single judge court, addressing the nonconstitutional claim first, *Wyman* v. *Rothstein*, 398 U.S. 275, 276 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970), found the Secretary's decision was based on "substantial evidence" and correct under the terms of the statute. 42 U.S.C. § 405(g). The court then examined the constitutional claim, found it to be substantial, and requested the convening of a statutory three judge court to decide the constitutional question. *See Norton* v. *Richardson*, 352 F.Supp. 596 (D.Md. 1972).

I.

Two preliminary points should be resolved before the merits of the constitutional issue are reached.

Plaintiff, at the oral hearing, requested this court to review the single judge's ruling as to the correctness of the Secretary's decision.

Earlier, plaintiff had requested the single judge to review the Secretary's decision, although the request was predicated on the condition that the single judge find that the Secretary's decision was not supported by substantial evidence. The single judge proceeded to decision of the question and concluded otherwise. Plaintiff now urges that the three-judge court has jurisdiction to review the Secretary's decision and indeed should do so, because if it rules that the Secretary's decision was erroneous because not supported by substantial evidence, the necessity of a decision on the constitutional question would be avoided. *Wyman* v. *Rothstein*, 398 U.S. 275, 276 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970).

The right of a single judge on his own motion to decide nonconstitutional questions before asking that a three-judge court be convened is the subject of some dispute between the circuits.[2] It is a power which has been exercised, albeit in factual circumstances distinguishable from the case at bar. Manifestly, the writer was satisfied that he possessed the power. The three-judge court, however, takes no position on the correctness of the writer's views, because it is satisfied that the single judge's determination was correct. Stated otherwise, the three-judge court finds it unnecessary to determine if the single judge did or did not have authority to decide nonconstitutional questions on his own

[2] *Compare* Bryant v. Carleson, 444 F.2d 353, 358-59 (9th Cir.), cert. denied, 404 U.S. 967 (1971); Kelley v. Illinois Bell Telephone Co., 325 F.2d 148, 151 (7th Cir. 1963); Chicago, Duluth & Georgian Bay Transit Co. v. Nims, 252 F.2d 317, 319 (6th Cir. 1958); Doe v. Lavine, 347 F.Supp. 357, 359-60 (S.D.N.Y. 1972); Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481, 485 (D.Conn. 1972); *with* Weintraub v. Hanrahan, 435 F.2d 461, 463 (7th Cir. 1970); Fort v. Daley, 431 F.2d 1128, 1132 n. 4 (7th Cir. 1970).

motion because if the question of the substantiality of the evidence to support the Secretary's determination were before it, it would arrive at the same result for the reasons advanced by the single judge.

The other preliminary point requiring initial consideration concerns plaintiff's request that the case be certified as a class action. The single judge deferred ruling on this point until this court was convened.[3] *See*, 352 F.Supp. at 601. Although the defendant has opposed such certification, the court believes the request is proper and should be granted. This action is clearly one coming under Rule 23(b)(2) in that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ." Moreover, the court finds the prerequisites of Rule 23(a) to have been met since "(1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. . . ." As required by Rule 23(c), the court defines the plaintiff class in this suit to include all of those persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that they be living with or supported by their father on the date of his death.

II.

The constitutional challenge plaintiff presents is that 42 U.S.C. § 416(h)(3)(C)(ii), as written, violates the due process clause of the Fifth Amendment, which pro-

[3] Plaintiff also requested a preliminary injunction, which request was properly referred by the single judge to this court. 28 U.S.C. §§ 2282, 2284(5). Because the court today considers final relief, the preliminary injunction request is moot.

scribes irrational discrimination in federal legislative classifications. *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973); *United States Dept. of Agriculture* v. *Murry*, 41 U.S.L.W. 5099 (June 25, 1973); *Frontiero* v. *Richardson*, 41 U.S.L.W. 4609 (May 14. 1973); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Bolling* v. *Sharp*, 347 U.S. 497 (1954). Plaintiff contends that § 416(h)(3)(C)(ii) impermissibly discriminates against a sub-class of illegitimate children who, although they can prove their paternity, cannot qualify for child's insurance benefits because § 416(h)(3)(C)(ii) requires that they be living with or supported by their father on the date of his death. Plaintiff contends the requirement of proof that the father lived with or supported his illegitimate child is irrational and that this court, by a declaration of unconstitutionality and injunction, should excise the offending requirement from § 416(h)(3)(C)(ii) leaving the remainder of that section so as to permit any illegitimate child who can prove paternity able to qualify for child's insurance benefits if otherwise eligible.

Because the equal protection clause of the Fourteenth Amendment prohibits irrational discrimination in state legislative classifications, courts have utilized an equal protection type of analysis in evaluating federal legislation under the due process clause of the Fifth Amendment. *E.g.*, *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973); *Frontiero* v. *Richardson*, 41 U.C.L.W. 4609 (May 14, 1973); *Richardson* v. *Belcher*, 404 U.S. 78 (1971). Before considering plaintiff's claim, it is first necessary to decide what equal protection standard should apply. Plaintiff contends strict scrutiny is appropriate; defendant, on the other hand, argues for the rational basis test.

Traditionally, two equal protection approaches have been used by the courts in evaluating legislation. Under one approach, commonly referred to as the "rational basis" test, a statute is evaluated to determine if it has some conceivably valid aim, and if the classification utilized in any way furthers that end.[4] The statute is presumed valid and any proper and related means are sufficient to uphold the statute against an equal protection challenge. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys from Allentown* v. *McGinley*, 366 U.S. 582 (1961). Only statutes, aimed at an end beyond the state's power to legislate, or which are patently arbitrary or lacking in rational justification are invalid under the rational basis test. *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Slanner* v. *Oklahoma*, 316 U.S. 535 (1942). *See generally*, *Note*, "Developments in the Law: Equal Protection", 82 Harv.L.Rev. 1065 (1969). Under the second approach, a legislative classification is evaluated to determine if it is based upon suspect criteria or imposes upon a fundamental, constitutionally secured right. If so, it is "inherently suspect" and "strict scrutiny" will be applied and the statute, no longer presumed constitutional, will be invalid under the equal protection clause unless it is directly related to a compelling governmental interest. Statutes subject to strict scrutiny bear a heavy burden of justification which few, if any, survive. *In Re Griffiths*, 41 U.S.L.W. 5143 (June 25, 1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). *See generally*, *Note*, "Developments in the Law: Equal Protection", *supra*. Because of the disparity of results of the two approaches, many modern equal protection controversies have focused on whether a fundamental right or suspect criteria was involved. If so, the statute was usually held invalid; if not, the statute was frequently upheld.

The current Supreme Court in utilizing the rational basis test appears to now require legislation to have a closer nexus to its purpose than was customarily demanded under the rational basis test in earlier cases. Strict scrutiny, however, is still applied as a test when classifications are suspect or fundamental constitutional

[4] Courts have often shown considerable imagination in this regard. *See, for example*, Goesaert v. Cleary 335 U.S. 464 (1964); Kotch v. River Port Pilot Comm'rs., 330 U.S. 552 (1947).

rights are implicated. Thus, while a suspect class or fundamental right will still invoke strict scrutiny—*e.g.*, *In Re Griffiths, supra*—the court, when dealing with other classifications under the rational basis test, appears more willing to examine the relationship between a statute's means and ends than earlier courts and to require that the relationship be substantial. The means, it would seem, under the rational basis analysis, must bear a direct and primary correlation to an actual statutory goal or purpose. This new equal protection position was lucidly discussed by Professor Gunther in "The Supreme Court 1971 Term", 86 Harv.L.Rev. 1 (1972) and has been recognized by the Fourth Circuit in *Eslinger* v. *Thomas*, No. 72-1542 (4th Cir. March 28, 1973). *See also*, Mr. Justice Rehnquist's dissent in *Weber* v. *Aetna Casualty Co.*, 406 U.S. at 177 (1972).

Closely analyzing plaintiff's claim—as was done in *San Antonio School District* v. *Rodriguez*, 41 U.S.L.W. 4407 (March 21, 1973)—it is clear that this is not a case calling for the application of strict scrutiny. To begin, no suspect class is here involved. No case has yet, although there have been ample opportunities, held that a classification based upon illegitimacy is *per se* suspect as a classification involving status of birth. Moreover, the class § 416(h)(3)(C)(ii) establishes is not coterminous with the class of illegitimates; rather, the class it establishes is a specific sub-class of the group of illegitimates as a whole, for it is clear that many illegitimates can qualify under § 416(h)(3)(C)(ii) and other provisions in the Act. *Jiminez* v. *Richardson*, 353 F.Supp. 1356 (N.D.Ill. 1973). Strict scrutiny is thus not demanded because a suspect classification is at hand. And neither is there a fundamental, constitutional right of which § 416(h)(3)(C)(ii) deprives a class. It has been repeatedly held by recent Supreme Court decisions that there is no constitutional right to social welfare and that strict scrutiny does not apply to welfare legislation. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

While strict scrutiny does not apply, it would appear this case calls for the application of the new rational basis approach. *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972), perhaps the Supreme Court's most definitive pronouncement on the equal protection rights of illegitimates, emphasized the new approach. *See also*, Mr. Justice Rehnquist's dissent, *supra* at 177. In accordance with the direction of the Supreme Court's latest equal protection position, the court shall examine § 416(h)(3)(C)(ii) under the rational basis test to see if it bears a substantial relationship to the purpose of the Social Security Act and is free of invidious discrimination. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eslinger* v. *Thomas*, No. 72-1542 (4th Cir. March 28, 1973).

Several Supreme Court decisions have considered laws dealing with illegitimacy. It is within the framework of these decisions that the examination of § 416(h)(3)(C)(ii) must proceed. The first two cases—*Levy* v. *Louisiana*, 391 U.S. 68 (1968) and *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968)—invalidated judicially construed restrictions in the Louisiana wrongful death statute which denied a right to recover on the basis of illegitimacy. In *Levy*, the court ruled that Louisiana could not prevent an illegitimate child from recovering for the wrongful death of its mother solely because the child was illegitimate where, had the child been legitimate, a right of recovery would have been provided. The court assumed the illegitimate child was dependent on its deceased mother in the economic, biologic, and spiritual sense and "in her death suffered wrong in the sense any dependent would." Rejecting the argument that the denial of a right of recovery promoted the morals and general welfare of the community by discouraging illegitimacy, the court found there was no sufficient reason for permitting a tort-feasor to escape his wrong merely because a child is illegitimate. The court, in concluding the statute denied equal protection, underscored the lack of any relationship between the legitimacy or illegitimacy of the child and the wrong inflicted upon the mother.

Glona, the companion case to *Levy*, similarly declared that the equal protection clause prevented Louisiana from

denying a mother a right to recover for the death of her child because the child was illegitimate. Louisiana's argument that its law discouraged sin was dismissed as "far-fetched," the court noting,

> It would, indeed, be farfetched to assume that women have illegitimate children so they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a casual connection with the "sin", which is, we are told, the historic reason for the creation of the disability. 391 U.S. at 75.

The court recognized the potential for fraudulent assertions of motherhood, but noted that this was a problem in burden of proof which had no application in cases where the claimant is "plainly the mother."

Labine v. *Vincent*, 401 U.S. 532 (1971), a 5 to 4 decision, affirmed Louisiana's intestacy law which denied illegitimates the right to inherit from their fathers even though publicly acknowledged. The court found Louisiana's interest in regulating family life and the disposition of property within its borders to provide a rational basis for the statute sufficient to withstand the equal protection challenge. The court distinguished *Levy* and *Glona* with the observation that, since a father could leave part of his property to a legitimated child (i.e.—one who was publicly acknowledged) the state had not erected an insurmountable barrier to the child's recovery, as was the case in the previous two decisions. The court felt that *Levy* and *Glona* did not prevent a state from ever treating illegitimates differently than legitimates and that Louisiana's disparity of treatment in its intestacy laws was constitutionally permissible.

Later decisions appear to have eroded the vitality of the majority's opinion in *Labine* and indicate that the minority view of the four dissenting judges, all of whom are still on the Court, is more in line with the Court's current stance. The minority opinion, authored by Mr. Justice Brennan, found the Louisiana intestate statute to invidiously discriminate against illegitimates without

rational justification and that the classifications established in the statute bore no intelligible or proper relationship to the consequences flowing from it. Mr. Justice Brennan noted that in *Levy*, an acknowledged illegitimate could have recovered and that, therefore, *Levy* did not involve an insurmountable barrier as the majority supposed. Moreover, he opined that merely because a discrimination fell short of providing an insurmountable barrier did not immunize it from the Fourteenth Amendment. In considering Louisiana's interest in dealing with problems of proof and reducing the opportunity for error, he stated that when formalities such as a public acknowledgment had been complied with, problems of proof abate.

> When a father has formally acknowledged his child or gone through any state authorized formality for declaring paternity, or when there has been a court judgment of paternity, there is no possible difficulty of proof, and no opportunity for fraud or error. This purported interest certainly can offer no justification for distinguishing between a formally acknowledged illegitimate child and a legitimate one. 401 U.S. at 552.

He felt that Louisiana's intestate statute was founded on the state's official policy of discrimination against illegitimates in matters of succession and inheritance and could not be justified as "a legislative judgment about the probable wishes of the deceased or the desires of most persons in similar situations." He recognized a contrary presumption when a father has made a public acknowledgment, commenting that "logic and common experience also suggest that a father who has publicly acknowledged his illegitimate child will *not* generally intend to disinherit his child." (emphasis original).

A key decision for this present case was rendered in *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972), where the court invalidated under the equal protection clause a section of Louisiana's workman's compensation statute which denied dependent, unacknowledged illegitimate children the right to share equally with acknowl-

edged illegitimate and legitimate children. In *Weber*, the deceased, Henry Clyde Stokes, died of injuries received in his employment, leaving four legitimate children and two illegitimate children by the woman he had been living with since his wife's commitment to a mental institution. With the exception of one of the illegitimate children, who was born posthumously, all of the children, including the one illegitimate child, were living with and supported by him at the time of his death. Under the Louisiana law, unacknowledged illegitimate children were entitled to benefits only to the extent such benefits were not exhausted by the claims of the legitimate and acknowledged illegitimate children. Henry Stokes' illegitimate children were not acknowledged and could not be acknowledged under Louisiana law due to Stokes' still existing marriage to his institutionally-committed wife. Because of a large tort settlement against a third party tort-feasor in favor of the legitimate children alone, the workman's compensation benefits were extinguished, with the illegitimate children receiving neither part of the settlement nor any workmen's compensation benefits.

The court found the statute to lack a rational basis for its discrimination, following as precedent its decision in *Levy* which proscribed, in the court's view, inequality of treatment of dependent illegitimate children and distinguishing its earlier decision in *Labine* as reflecting "the traditional deference to a state's prerogative to regulate at death the disposition of property within its borders." The court placed primary emphasis upon the fact that, although dependency was a prerequisite to anyone's recovery, under the Louisiana workman's compensation statute, equal dependents were treated unequally.

> So far as the record shows, the dependency and natural affinity of the unacknowledged illegitimate child for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate child all lived in the home of the deceased and were equally dependent upon him for maintenance and support. . . . The unacknowledged

> illegitimate . . . is a *dependent child*, and as such, is entitled to rights granted other *dependent children*. (emphasis original). 406 U.S. at 169.

The court, again distinguishing *Labine*, pointed out that Louisiana had erected an insurmountable barrier for the illegitimates, since it was impossible for their fathers to acknowledge them so they would receive equal benefits under the statute. Rejecting the argument that the classification furthers Louisiana's interest in family relationships, the court concluded that "[t]he inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workman's compensation statutes commendably serve."

The court, in arriving at its decision in *Weber*, took particular effort to point out that its decision in no way altered "the state interest in minimizing problems of proof. . . ." Louisiana's statute, while making dependency a prerequisite for recovery, also conclusively presumed that dependency was present for those children under 18 who were living with the parent at the time of the injury. The court found no fault with limiting recovery only to actual dependents and accepted the need to draw arbitrary lines in response to problems of proof. As the court wrote:

> Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased, Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood. Our decision fully respects Louisiana's choice on this matter. It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and avoids altogether diffuse questions of affection and affinity which pose difficult probative problems.

> Our ruling requires equality of treatment between two classes of persons the genuineness of whose claims the State might in any event be required to determine. 406 U.S. at 174.

The court's view on this point, as will be related further on, is of crucial importance to this present case.

The next Supreme Court decisions on illegitimacy came in summary affirmances of two three judge court cases declaring unconstitutional § 403(a) of the Social Security Act as a denial of Fifth Amendment due process. *Davis* v. *Richardson*, 342 F.Supp. 588 (D. Conn.), *affirmed*, 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F.Supp. 1226 (D. Md.), *affirmed*, 409 U.S. 1069 (1972). *See also*, *Morris* v. *Richardson*, 346 F.Supp. 494 (N.D. Ga. 1972), *vacated on other grounds*, 41 U.S.L.W. 3390 (January 15, 1973); *Maracle* v. *Richardson*, 348 F.Supp. 234 (S.D.N.Y. 1972); *Williams* v. *Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972). Section 403(a) of the Social Security Act limited the benefits § 416(h)(3) children received to those that remained only after other qualifying children received a full share out of a maximum family allowance. Both *Davis* and *Griffin* found this discrimination to lack a rational relationship to the purpose of the Social Security Act. The courts noted that the Social Security Act set up a class of beneficiaries eligible for benefits but who were arbitrarily denied full participation rights. They pointed to the absence of proof problems resulting from the need of the § 416(h)(3) children to qualify initially and to the strong probability of actual dependency which must have been demonstrated to meet the requirements of § 416(h)(3). The courts discounted the government's argument that § 403(a) promoted family relationships and discouraged illegitimacy and found that § 403(a) denied due process of law.

The last Supreme Court decision instructive on this question was *Gomez* v. *Perez*, 41 U.S.L.W. 4174 (January 17, 1973).[5] Texas, while granting legitimate children a

[5] *See also*, Linda R.S. v. Richard D., 41 U.S.L.W. 4371 (March 5, 1973), an illegitimacy case which was dismissed for lack of standing.

judicially enforceable right to support from their fathers, denied the same to illegitimates. For this reason, the Texas courts denied the plaintiff's suit for support, although plaintiff had established paternity to the court's satisfaction. Juxtaposing the right afforded legitimate children with the denial of that right to illegitimate children, the court found an "unmistakeable" violation of equal protection rights. In the court's words:

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother. For a State to do so is "illogical and unjust." 41 U.S.L.W. at 4175.

While recognizing the "lurking problems with respect to proof of paternity" and admitting that they "are not to be lightly brushed aside," the court held that "neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

Other Supreme Court cases, although not directly concerned with illegitimacy, have dealt with the problem of discrimination in social welfare legislation. The general principle established by these decisions is that invidious discrimination which is not rationally related to the statute's purpose is impermissible, *United States Dept. of Agriculture* v. *Murry*, 41 U.S.L.W. 5099 (June 25, 1973); *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973). However, the cases recognize also that social welfare legislation cannot be expected to be surgically precise in its classification and the existence of some discrimination incidental to the statute's goal and the means used to achieve it will not make the statute constitutionally infirm under either the Fifth or Fourteenth Amendments. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S.

78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). What the Court stated in *Dandridge*, *supra* at 485, in regard to equal protection:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

it later reaffirmed in *Richardson*, *supra* at 84, for due process:

> We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

The child's insurance benefits provision of the Social Security Act is founded on the dual concepts of parentage and dependency. To be eligible for benefits, a claimant must be both the child of and dependent upon the deceased wage earner. 42 U.S.C. § 402(d)(1). The purpose of the Act, consistent with this dual concept, is to replace the support lost to a child when the wage earner dies. What must now be determined is whether § 416(h)(3)(C)(ii)'s requirements bear a direct and substantial relationship to this purpose.

Plaintiff, not disputing the dependency focus, argues that the Social Security Act does not require actual dependency, but is satisfied by potential dependency. What the benefits provided are intended to replace is not actual support, but the loss of the right to support.

While this contention is facilitating to plaintiff's position, it is not, in this court's opinion, consistent with the Act's purpose, intent, or requirements. In amending the Social Security Act to include § 416(h)(3), the Senate Report described the Act as "a national program that is intended to pay benefits to replace the support lost by a child when his father . . . dies. . . ." Senate Report No. 404, 1965 U.S. Code Congressional and Administrative News, p. 2050. The cases interpreting the child's insurance provisions have similarly concluded that the Act is founded on actual dependency. *Davis* v. *Richardson*, 342 F.Supp. 588 (D. Conn.), *affirmed*, 409 U.S. 1069 (1972); *Jiminez* v. *Richardson*, 353 F.Supp. 1356 (N.D. Ill. 1973); *Watts* v. *Veneman*, 334 F.Supp. 482 (D. D.C. 1971), *affirmed in part, reversed in part on other grounds*, 476 F.2d 529 (D.C.C. 1973). Moreover, the mere fact that the provision plaintiff challenges requires proof of actual dependency belies the conclusion that the Act is directed to potential dependency.[6]

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[6] Plaintiff cites, in suport of his position that potential dependency or the right to support are all that is required, a section of House Senate Conference Committee Report on the 1965 Amendment to the Social Security Act adding 42 U.S.C. § 416(h)(3), 111 Cong. Record 18387, which reads as follows:

> A child would be paid benefits based on his father's earnings without regard to whther he has the status of a child under State inheritance laws if the father was supporting the child or had a legal obligation to do so.

While the report speaks of paying benefits if "the father was supporting the child or had a legal obligation to do so," it was not speaking of § 416(h)(3)(C)(ii) alone, but was also talking in reference to § 416(h)(3)(C)(i) which established the paternity decree, court order, or written acknowledgment test. Illegitimates who could establish claims under § 416(h)(3)(C)(i) would, in most instances, legally be entitled to support from their fathers. Such was not always the case with illegitimates unable to meet § 416(h)(3)(C)(i)'s criteria. *See, e.g.*, Gomez v. Perez, 41 U.S.L.W. 4174 (January 17, 1973). This legislative history does not, from this court's reading, establish that the Social Security Act is based on potential, rather than actual, dependency. Rather, the report is descriptive of the Act's effect.

The whole thrust of § 416(h)(3)(C)(ii) is that of determining both the biological connection and the dependency required by the Act for benefits. The provision requires some proof sufficient to the Secretary of actual paternity. It then requires proof that the illegitimate child whose paternity is proven establish either that he or she actually was supported by the wage earner on the date of his death or, alternatively, that he or she lived with the wage earner on the date of his death, the presumption being that a wage earner's children who live with him are supported by him. Those children who prove § 416(h)(3)(C)(ii)'s dual elements satisfy the Social Security Act's prerequisites of being the wage earner's child and dependent upon him, and, if otherwise qualified, they share equally with all other qualified dependent children of the deceased wage earner.

A statute can treat illegitimate children differently than legitimate children as long as the distinction is based upon rational grounds. *Labine* v. *Vincent*, 401 U.S. 532 (1971); *cf. Weber* v. *Aetna Causalty Co.*, 406 U.S. 164 (1972); *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968). It is not invidious discrimination to require § 416(h)(3)(C)(ii) children to establish the dual elements of paternity and dependency when such is not required of legitimates and those illegitimates qualifying under § 416(h)(2)(B) or § 416(h)(3)(C)(i). The parentage of legitimate children is not in issue and it is clearly rational to presume the overwhelming number of legitimate children are actually dependent upon their parents for support. Likewise, the parentage of the children of an invalid marriage would not normally be in dispute and such children would typically live in the wage earner's home or be supported by him. Although the illegitimate § 416(h)(3)(C)(i) children need not offer proof to the extent the § 416(h)(3)(C)(ii) children must, it is rational to afford them the same presumptions as the legitimate children or children of invalid marriages. For those with a paternity decree or support order, a judicial tribunal will have already addressed the parentage issue and resolved it for the illegitimate child. When an order of support is entered by a court, it is reasonable to assume compliance

occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is more likely to provide it support than one who does not. To presume the acknowledged child's paternity and dependency is rational.

Unlike the statute in *Weber*, which treated equal dependents unequally, the Social Security Act now affords full equality of treatment between dependent legitimates and dependent illegitimates. It does not treat legitimate children differently from illegitimate children; what it does is treat differently those likely to be the dependent children of the wage earner from those not as likely to be by requiring further or substantiating proof from the latter. That Congress has permitted some simplified, formalistic proof to suffice for the § 416(h)(3)(C)(i) illegitimate children is not impermissible discrimination. The dissent in *Labine* recognized the propriety of establishing formalities like an acknowledgment to surmount problems of proof. In like manner, the *Weber* court, as before mentioned, recognized that arbitrary lines as to problems of proof occasionally must be made and emphasized that its decision fully respected the statutory choice as long as those equally within the statute's purpose were not treated unequally under the statute.[7]

The Social Security Act has not placed impenetrable barriers of proof before illegitimates who seek to qualify. *Labine* v. *Vincent*, 401 U.S. 532 (1971); *cf. Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972). It provides in

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[7] Other arbitrary lines having nothing to do with illegitimacy are also perforce drawn in defining benefit entitlement consistent with the Act's purpose. For instance, a 19-year-old who was not a full time student or disabled, although perhaps dependent, would not be eligible for benefits. 42 U.S.C. § 402(d)(1)(B). Nor would a 16-year-old married child of the wage carner, no matter how dependent, be able to obtain child's insurance benefits. 42 U.S.C. § 402(d)(1)(B).

§ 416 (h) (3) (C) (i) alternative and simplified methods of proof consistent with the Act's purpose, and for those unable to utilize the formalistic methods, it provides a catch all provision—§ 416 (h) (3) (C) (ii)—designated to enable those the Act intended to cover to qualify. Under the Social Security Act, an illigitimate child has a variety of ways of demonstrating entitlement, none of which are impervious to any illegitimate factually within the Act's intendment.

This is not a situation similar to *Gomez* v. *Perez*, 41 U.S.L.W. (January 17, 1973), where Texas law afforded illegitimates no rights while affording rights to legitimates. Here, the Social Security Act permits illegitimates who can prove entitlement to receive benefits. The court believes that the Supreme Court in *Gomez* would have found no denial of equal protection had Texas law enabled illegitimates to obtain paternal support to the same extent as legitimates provided they demonstrated their entitlement by proving their paternity to the court. Nor does this court believe the *Gomez* court, which recognized the "lurking problems with respect to proof of paternity," would have found a denial of equal protection in requiring some illegitimates to prove their paternity before support was ordered when such was not required of legitimates or certain illegitimates who had complied with statutorily defined formalities regarding the question of proof.

Plaintiff's problem—and the underlying reason for his failure to qualify—is that the child's insurance benefits provisions of the Social Security Act were never intended to cover Gregory Norton or the class he represents. These provisions were designed, not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended. This choice was unquestionably one Congress, faced with finite resources, could make. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). Although Gregory Norton, Jr. may well have been the child of Gregory Norton, Sr., he was never supported by his father. Because of this lack of dependency, he was never

intended by Congress to receive the wage benefits Gregory Norton, Sr. may have earned. In short, he could not comply with the dependency prerequisite in the Social Security Act. And as the Court in *Weber* made clear, a statute providing benefits to a deceased's children can make dependency a prerequisite to entitlement and thereby solve potentially difficult problems of proof as long as all dependents are treated equally.

What plaintiff would have the court do is excise the dependency requirement from the statute and thereby permit anyone to recover who can prove paternity.[8] Yet, as has been said, the Constitution does not require this of the legislature, dependency being a permissible legislative criterion. *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972). Whatever may be the wisdom or desirability of providing a dole for all needy children, it is certain that Congress has not done so with the Social Security Act and this court, sitting as arbiter of a constitutional issue, cannot legislate for Congress. The dependency requirement is but one of two prerequisites. Just as this court cannot eliminate the parentage requirement for those children who were dependent on the wage earner but who were not the wage earner's offspring, this court cannot eliminate the dependency requirement for those children who can prove their parentage but who were never dependent on the wage earner.

The lack of coverage for non-dependents in the Social Security Act distinguishes the present case from *Levy* v. *Louisiana*, 391 U.S. 68 (1968). The Supreme Court in *Levy*, assuming the illegitimate child had the same affinity for and dependency on its mother as any legitimate child, pointed to the lack of any nexus between Louisi-

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[8] Were the court inclined to agree with plaintiff, the relief requested presents practical problems of its own. A court can excise part of an unconstitutional statutory provision only when the remainder will not alter the purpose, scope or operation of the statute in a way the legislature never intended. United States v. Jackson, 390 U.S. 570, 585 (1968); Fowler v. Gage, 301 F.2d 775, 778 (1962); Poe v. Menghini, 339 F.Supp. 986, 996 (D.C.Kan. 1971). To excise the dependency requirement from § 416(h) (3)(C)(ii) would completely alter the purpose, scope and operation of the Social Security Act. Yet if this provision were struck down in its entirety, plaintiff's claim would be completely barred.

ana's denial of a right of recovery for wrongful death and the wrong inflicted the child on the death of its mother. Such a nexus does exist in the denial of benefits to Gregory Norton for, never having received support from his father, there was no support for the Social Security Act to replace. While the denial of recovery to the illegitimate child in *Levy* lacked a connection to the purpose of the wrongful death statute, the denial of benefits to Gregory Norton directly emanates from the Social Security Act's *raison d'etre*. Moreover, in this present case, no wrongdoer—i.e. tort-feasor—receives a windfall from dscrimination against a hapless illegitimate who is barred from seeking compensation for a wrong done him. Rather, in this case, a class of children not dependent seeks the right to share equally with those who are. Those who never were supported by their wage earner fathers seek a benefit at the potential expense of others who were so supported.[9]

Moreover, past cases have demonstrated that, under the view that the Social Security Act should be construed to include rather than exclude, the dependency requirement will be liberally interpreted to avoid fortuitous hardship. In *Weber*, the Court noted that in its view, a posthumous illegitimate child, albeit unable to exhibit comparable dependency and affinity to a parent as could a child living at the time of the parent's death, should be treated the same as a posthumous legitimate child. The Social Security Act would provide coverage to a posthumous legitimate child and, under judicial construction, would similarly provide benefits for posthumous illegitimate children born into a household which the deceased wage earner

[9] While it is true the benefits in Gregory Norton's case will never be used if not for him, such would not always be the case, for the maximum benefits are frequently exhausted without all eligible children receiving a full entitlement. *See, e.g.*, Griffin v. Richardson, 346 F.Supp. 1226 (D.Md. 1972) *affirmed*, 409 U.S. 1069 (1973); Davis v. Richardson, 342 F.Supp. 588 (D.Conn. 1972), *affirmed*, 409 U.S. 1069 (1973). Although it may not be inequitable or uncharitable to permit Gregory Norton to receive the benefits in preference to their lapsing, for the court do so so would, because of the class action as of the case, if not by *stare decisis* alone, lay the groundwork for future inequities.

was either living in or supporting at the time of his death. This was the specific holding of the Fifth Circuit in *Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1969). Other courts along this same line have construed the living with or support by requirement of § 416(h)(3)(C)(ii) liberally in face of hardship, and have indicated that in the proper case the arbitrary, although permissible, line drawn that dependency exists at the time of death will not bar an otherwise just claim. *Jackson* v. *Richardson*, CCH Unemployment Insurance Reports, ¶ 16,767 (S.D.W.Va. 1972); *Crisp* v. *Richardson*, CCH Unemployment Insurance Reports, ¶ 16,612 (W.D.N.C. 1972); *Bridges* v. *Sec. of HEW*, CCH Unemployement Insurance Reports, ¶ 16,480 (E.D.N.Y. 1971); *Mobley* v. *Richardson*, CCH Unemployement Insurance Reports, ¶ 16,439 (W.D.N.C. 1971).

Those courts which have considered the question of whether the Social Security Act can require proof of dependency from illegitimates have found the requirement permissible.[10] *Beaty* v. *Weinberger*, No. 72-1356 (5th Cir., April 23, 1973); *Perry* v. *Richardson*, 440 F.2d 677 (6th Cir. 1971); *Watts* v. *Veneman*, 334 F.Supp. 482 (D.D.C. 1971), *affirmed in part, reversed in part on other grounds*, 476 F.2d 529 (D.C.Cir. 1973). This court also, for the reasons stated, concludes the dependency requirements of § 416 (h)(3)(C)(ii) do not invidiously discriminate against illegitimates or lack of rational relation to the Social Security Act's purpose or intent. Section 416 (h)(3)(C)(ii) does not, therefore, violate the due process clause of the Fifth Amendment.

Because of the court's conclusion, summary judgment for defendant shall be entered separately under Rule 58, Fed.R.Civ.P. Counsel for defendant, with notice to counsel for plaintiff, shall submit a form of judgment

[10] In fact, in every lower court and Supreme Court case where impermissible discrimination against illegitimates was invalidated, with the exception of Gomez v. Perez, 41 U.S.L.W. 4174 (January 17, 1973), the illegitimates were either found or assumed by the court to be actually dependent. The *Gomez* case is exceptional only because it dealt with an illegitimate child's right to become dependent.

in accordance with this opinion. The Clerk is directed to forward copies of this opinion to counsel.

/s/ Harrison L. Winter
HARRISON L. WINTER
United States Circuit Judge

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge

APPENDIX

42 U.S.C. § 402—Child's insurance benefits

(d) (1) *Every child (as defined in section 416(e)* of this title) of an individual entitled to old-age or disability insurance benefits, or *of an individual who dies a fully or currently insured individual, if such child* —

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and

(i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 18, and

(C) *was dependent upon such individual*

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, *at the time of such death*, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so. . . .

* * * *

(d) (3) *A child shall be deemed dependent upon his father* or adopting father or his mother or adopting mother *at the time specified in paragraph (1)(C) of this subsection unless, at such time, such indiivdual was not living with or contributing to the support of such child and—*

(A) *such child is neither the legitimate nor adopted child of such individual,* or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

42 U.S.C. § 416—Additional definitions

For the purposes of this subchapter—

(e) The term "child" means (1) the child or legally adopted child *of an individual,* and (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died . . .

42 U.S.C. § 416 (h) (2)—Determination of family status

(A) *In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of interstate personal property* by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, *by the courts of the State in which he was domiciled at the time of his death,* or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. *Applicants who according to such law would have the same status relative to taking interstate personal property as a child or parent shall be deemed such.*

(B) *If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be*

deemed to be the child of such insured individual if such insured individual and *the mother or father,* as the case may be, *of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.*

42 U.S.C. § 416(h) (1) (B) (last sentence)

. . . For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

42 U.S.C. § 416(h)

(3) *An applicant who is the son or daughter* of a fully or currently insured individual, *but who is not (and is not deemed to be) the child* of such insured individual under paragraph (2) of this subsection, *shall nevertheless be deemed to be the child* of such insured individual *if:*

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated, PLAINTIFF

v.

CASPAR W. WEINBERGER, Secretary, Department of Health, Education and Welfare, DEFENDANT

ORDER

This matter having come before the Court on Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment and the Plaintiff's Motion for Summary Judgment and the Court having considered the pleadings and the briefs filed by the parties, and having heard the argument of counsel, and being fully advised in the premises, and the Court having concluded that there is no disputed issue of material fact and that the defendant is entitled to judgment as a matter of law, it is hereby this 27th day of September 1973,

ORDERED that defendant's Motion for Summary Judgment be and is hereby granted and summary judgment be and is hereby entered in defendant's favor and the action is dismissed and it is

FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

/s/ Harrison L. Winter
HARRISON L. WINTER
United States Circuit Judge

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 73-5598

GREGORY NORTON, JR., a minor, etc., APPELLANT

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

ON CONSIDERATION of the motion of the appellant for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 24, 1974

SUPREME COURT OF THE UNITED STATES

No. 73-5598

GREGORY NORTON, JR., a minor, etc., APPELLANT

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

APPEAL from the United States District Court for the District of Maryland.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland for further consideration in light of Jimenez v. Weinberger, 417 U.S. —— (1974).

June 24, 1974

ATTACHMENTS TO PLAINTIFFS' MEMORANDUM ON REMAND FROM THE SUPREME COURT

CITY SEEKING AID TO ENFORCE SUPPORT-PAYMENT COLLECTION

[Jan. 11, 1971—M]

Non Support

By G. JEFFERSON PRICE 3d

The D'Alesandro administration will present a bill to the City Council today which would authorize a $90,000 grant to the Supreme Bench to help enforce the collection of millions of dollars in court-ordered support payments by derelict parents and spouses.

The funds would be made available by the State Department of Social Services and used by the Department of Probation, which would force the collection of the overdue payments on behalf of families now on the state's welfare rolls, according to Nicholas C. Mueller, chairman of the State Board of Social Services.

Raleigh C. Hobson, the director of the State Social Services Administration, estimated yesterday that there is more than $10 million outstanding in uncollected support payments.

Collection Rate Under 25 P.C.

Under the present system, he explained, the Supreme Bench has been able to bring judgments against the derelict parents and spouses, but there has been no one responsible for enforcing the orders. The collection rate is less than 25 per cent, he added.

Mr. Muller estimated that once the collection force of about 10 persons is established, the court might be able to force the collection of about $5 million in the first year.

The money would be turned over to the state and federal governments as a reimbursement for the amounts they have paid in welfare to the families affected by the non-payments. Three percent of the amount collected would go to the city, Mr. Hobson said. Thus, he reasoned, the program would support itself after the first year.

Although the expenditure involved is relatively small, and it comes at no initial cost to the city, the measure is not expected to pass through the Council without some strong opposition.

One of the most vocal opponents is expected to be Mrs. Janet Hofman, the Council's fiscal adviser, who has fought the plan in the past.

First, she feels that there is a matter of principle involved in that the Supreme Bench is a state responsibility. The money, in effect, would be going from one state agency to another, and she questions the necessity of going through the Council for approval. Secondly, she reasons, city's having to pay for the measure could result in the city's having to pay for the collection force out of its own budget if the state were to decide at some time in the future that it would no longer finance the project.

Charter Requirement

Mr. Hobson said yesterday that the transfer of funds must be approved by the Council because of a requirement in the City Charter. Also, he said, the Supreme Bench does not have the mechanism for paying the salaries of the collection force. The Bench and the Department of Social Services want the employees to be part of the Department of Probation, whose salaries are paid by the city, even though they are not subject to the city's civil-service requirements.

COMPUTER PUTS NONSUPPORT AT $65 MILLION IN CITY

Divorce and The Courts

[Mar. 27, 1973—E]

By GEORGE HANST

A computer report indicates that men who are under Baltimore court orders to support their wives and children are behind in their payments by $65 million.

William L. Quirk, director of the Probation Department of the Supreme Bench, admits the existence but questions the accuracy of the figure produced by the computer that monitors the 44,000 cases under his supervision.

May Have Ended

"It's a machine figure," Mr. Quirk said. "I don't know what it represents."

Mr. Quirk explained that a man's support obligations may have been ended for some time, but unless someone tells the Probation Department the computer continues to accumulate arreages against him.

The director said there is "no clear way of saying how much money is legitimately owed." He added, however, that "it's a lot."

Mr. Quirk said the cases, some as old as 20 years, would have to be processed and followed up individually in order to obtain an acccurate figure of arreages.

Even then, part of the backlog would be uncollectible, because some of the men are in prison or otherwise have no money, he said.

Believed Uncollectible

Mr. Quirk said the cost of examining the arrearages on a case-by-case basis would have to be measured against the increased payments that such an investigation might generate.

The director said he believes that a concentrated effort would only reveal "dollars that aren't there anyway"—the uncollectible accounts.

Mr. Quirk has a staff of 33 to manage the 44,000 cases. The case load involves some 39,000 persons, but many of them are under two or more separate court orders, which accounts for the higher number of cases.

The director said he has pleaded for extra personnel for 15 years but has been given no additional staff since 1967.

Improvement Hopes

"But the cases still keep coming," he said.

"I know I'm doing the best I can with what I've got," Mr. Quirk said. "We hope to do better and develop ways to do better."

He said he expects a greater potential and more resources when the department goes under the state probation system July 1.

Mr. Quirk said his department is making a "crash" effort to keep on top of cases filed since September 15, with moderate success.

Dunning Letter

"We don't have the people to do it, it means something else goes," he said.

The department also is studying the effect of a dunning letter sent to about 1,600 persons who have fallen behind in payments, he said.

The department will evaluate what the effort did to raise the level of payments and determine whether another sample mailing can be managed.

The returns from the first mailing between February 22 and March 9 are inconclusive and illustrate the problem the department has in enforcing support orders, Mr. Quirk said.

35 P.C. Undeliverable

Fully 35 per cent of the letters could not be delivered because the addressee was unknown or had moved, Mr. Quirk said.

Another 58 per cent had not responded to the letter by March 20, he said.

"I could dun everybody, then run for the hills," Mr. Quirk said, recalling the outcome of the arrearage notices sent to 29,000 persons at one time in October, 1970.

Within two days, Mr. Quirk said, there was a line of people all around the block, and the staff had to work overtime for two weeks, but only 10 per cent of the letters brought a response.

"If we got all of them in, the jail wouldn't be big enough, and the court would be tied up," Mr. Quirk said.

He said that nonsupport "is not a critical area of the law" to most observers.

Mr. Quirk said the person who fails to support his family "is the worst offender, worse than the guy who hits you over the head."

The family deserter's child "is the one who drops out of school; his daughter gets pregnant, his boy is the one who hits you over the head," Mr. Quirk said.

"The fact that he pays (support) doesn't help the situation; the family is still broken," he said.

Quicker Involvement

Mr. Quirk, an advocate of a family court system that would put all domestic relations problems in one jurisdiction, said the probation department should be involved as soon as cases are instituted rather than later.

"A divorce order may come down today, saying the support order is effective a month ago," Mr. Quirk said. The man "is in arrears from the beginning. He knows he can't pay, we know he can't pay, but that's what the order says."

Situations that change support obligations include the death of the father, or the marriage of a dependent teenager.

"The People we deal with are usually the last ones to come and tell us if the situation changes," Mr. Quirk said.

Greater Liaison Urged

Judge Solomon Liss of the Supreme Bench initiated a series of conferences over the past few months that suggested greater liaison between agencies that have an interest in enforcing support orders.

The meetings brought together representatives from the state's attorney's office, the attorney general's office, the District Court, the sheriff's office, the probation department, the Police Department, the city department of social services, and the state Social Services Adminisration.

The agencies promised to exchange information to help locate parents failing to pay support and recommended jailing those who refuse to pay.

SUPPORT PAYMENTS INCREASE

Child Support—Baltimore

[Oct. 18, 1973—M]

By GEORGE J. HILTNER

A conference of social, domestic relations, probation and prosecution officials was told yesterday that support payments for children and wives increased by more than $300,000 following a crackdown by Judge Meyer Cardin last year.

The increase in receipts also resulted in the removal of a number of welfare receipients from the rolls, according to Lloyd A. Anderson, assistant director for income maintenance of the city Department of Social Services.

Judge Cardin found while sitting in the domestic relations court that mothers receiving welfare payments for themselves and their children often refused to appear in court to prosecute their husbands or the fathers of their children.

He threatened them with incarceration, and in one instance sent a recalcitrant mother to jail for failing to obey a court summons, the judge said.

When word reached the welfare community regarding the judge's actions, contributions from the fathers, many of whom were actually living with their families, began to increase and many of the recipients took themselves off relief rolls, the judge was told.

Mr. Anderson said contributions by fathers still are on the increase, and an average of 15 welfare cases a month are being dropped. Costs for medical care and food stamps also are dropping as a result, he noted.

The conference was told further that a search of welfare lists revealed that dating back to 1969 there were 8,667 men under court order who owed almost $20 million in support payments.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

v.

CASPAR W. WEINBERGER, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

C. Christopher Brown, of Baltimore, Maryland, for plaintiffs.

Carla A. Hills, Assistant Attorney General, Harland F. Leathers and Bruce E. Titus, Attorneys, Department of Justice, Washington, D.C.; George Beall, United States Attorney for the District of Maryland, and Jeffrey White, Assistant United States Attorney, of Baltimore, Maryland, for defendant.

Before Winter, Circuit Judge, and Murray and Blair, District Judges.

Filed: February 28, 1975

OPINION

Blair, District Judge.

Our judgment in *Norton* v. *Weinberger*, 364 F. Supp. 1117 (D. Md. 1973)[1] was vacated and the case remanded by the Supreme Court for reconsideration in light of *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). Upon reconsideration, aided by the briefs and arguments of counsel, we are persuaded that *Jimenez* neither compels nor justifies any change in our earlier opinion and judgment. We will review briefly the two decisions and note our reasons for this conclusion.

[1] *See also* Norton v. Richardson, 352 F. Supp. 594 (D.Md. 1972).

Our Decision in Norton

Gregory Norton, although shown by evidence satisfactory to the Secretary to be the child of a deceased insured individual, was denied benefits under 42 U.S.C., §§ 402(d)(1), 402(d)(3), 416(h)(3)(C)(ii) because it could not be shown that prior to his death his father had lived with or contributed to his support. Not being eligible for benefits under any other provisions of the Act, Norton sought, among other relief, a declaration of the unconstitutionality of § 416(h)(3)(C)(ii). We held that the denial of benefits to Norton because he was not dependent on his father within the terms of the Act did not deny him equal protection of the laws as guaranteed by the due process clause of the Fifth Amendment. While our earlier opinion in *Norton* speaks for itself and need not be repeated here, a few points should be noted.

First, on the issue of the constitutionality of the statute's scheme for showing dependency, we refused to hold that illegitimacy is a "suspect classification." Thus, we refused to apply a "strict scrutiny" or "compelling governmental interest" standard in reviewing the Act. Rather, we applied the type of equal protection analysis which the Supreme Court discussed in *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972).

Second, we rejected the plaintiff's suggestion that Congress intended, by the child's insurance benefits provisions, to aid every child of a deceased individual. Instead, we concluded that the primary purpose of the insurance provisions was to aid dependent children. In the words of the Senate Report accompanying the 1965 Amendments, the insurance program was "intended to replace the support lost by a child when his father retires, dies, or becomes disabled." S.Rep.No. 404, 89th Cong., 1st Sess. (1965), 1965 *Cong. & Admin. News*, 1943, 2050.

Third, after determining that the primary purpose of the Act was to replace support lost by a child, we analyzed the statutory scheme of categories and presumptions and

concluded that it bore a rational and substantial relationship to the principal goal of the Act.

The Supreme Court's Decision in Jimenez

Eugenio and Alicia Jimenez were illegitimate children conceived and born after their father became disabled. From their birth, they lived with and were supported by their father and he acknowledged them as his children. Under Illinois law, however, they were not able to inherit from their father and were classified as illegitimates because their parents never married. Since they were born after the onset of their father's disability—the event insured against—he could not have acknowledged them, nor have been ordered by a court to make support payments, nor decreed by a court to be their father prior to his disability. *Jimenez* at 630-31. *See* § 416(h)(3)(B)(i). Similarly, it was impossible for the children to demonstrate that their disabled father lived with them or contributed to their support at the time his disability began. *See* 416(h)(3)(B)(ii). Dissimilarly, their older illegitimate sister was eligible to receive benefits because she was conceived prior to the father's disability and had lived with him and received his support at the requisite time. *Jimenez* at 630-31. Thus, while the older sister was eligible to receive benefits, the two after-born Jimenez children were unable to satisfy any of the alternate prerequisites to receive like treatment. *See* §§ 402(d)(3), 416(h)(2)(B), 416(h)(3)(B).

In *Jimenez*, the Supreme Court took a very narrow approach. In an opinion by Chief Justice Burger, the Court did not pose the issues in terms of discrimination between legitimates and illegitimates, rather, it analyzed the plaintiffs' challenge in terms of discrimination between certain subclasses of illegitimates. *Jimenez* at 635-36. By taking that approach, the Court had no reason to reach the question of whether illegitimacy is a "suspect classification," and, it expressly refused to reach that issue. *Id.* at 631-32.

The Supreme Court focused its analysis upon the fact that the Jimenez children were denied benefits solely because they were conceived and born after the onset of their father's disability. The Court began by determining

that "the primary purpose of the contested Social Security scheme is to provide suport for dependents of a disabled wage earner." *Jimenez* at 633-34. In identifying that goal, the Court rejected the argument that the Act's purpose was to aid only children who were dependent at the time of the disabling injury. *Id.* at 634-35. In the Court's view, Congress intended to aid all dependent children.

Having identified the primary purpose of the Act, the Court noted that after-born illegitimate children were for practical purposes divided into two subclasses. First, there were those who could recover without proving actual dependency prior to the disability, because they were presumed by the Act to be dependent at the requisite time. Second, there were those after-born illegitimates who were denied benefits, solely by reason of the timing of their births, because they could not possibly demonstrate dependency at the time their parent was disabled. Included within the latter class were children who, like Eugenio and Alicia Jimenez, were genuinely dependent upon their disabled parent.

The conclusive exclusion of such after-born children, the Court held, could not be justified solely on the basis of a claimed desire to avoid spurious claims. *Jimenez* at 636-37. The Court wrote,

> [T]he Act's definition of these two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimated, solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provisions of the Fifth Amendment.

Id. at 637.

On remand, the Court directed that the Jimenez children were to be afforded an opportunity to demonstrate their eligibility by showing "that [they] are the children of the claimant, that they lived with the claimant all their lives, that he has formally acknowledged them to be his children, and that he has suppoted and cared for them since birth." *Jimenez* at 637-38.

The Act

Norton, like *Jimenez*, involves an attack upon the Social Security Act's scheme for providing benefits to children of persons insured under the Act. Although *Jimenez* involved disability benefits, while *Norton* involves survival benefits, the basic mechanics are essentially similar and involve either identical or parallel provisions of the act.

As they relate to *Norton*, we synthesize our understand- of the pertinent provisions of the Act. The term "child" means "the child or legally adopted child of an individual" as well as certain stepchildren and grandchildren. § 416 (e).[2] A child is entitled to benefits[3] if at the time of the event insured against the child was "dependent" upon the insured individual. § 402(d)(1). Legitimate and adopted children are "deemed dependent". § 402(d)(3). Children of marriages which are invalid for specified reasons, § 416 (h)(2)(B), and children who at specified times have been (a) acknowledged in writing by the insured individual, or (b) decreed by a court to be the child of an insured individual, or (c) the beneficiary of an order of court directing the insured individual to provide support are deemed to be the children of the insured individual, § 416(h)(3)(C)(i), and are also "deemed legitimate" and thereby "deemed dependent." § 402(d)(3).

As an alternate means of showing eligibility for benefits, a child who at the time of the event insured against could inherit personalty through intestate succession by the laws of the insured's state of domicile (with qualifications not pertinent) is deemed to be the child of the insured

[2] Further definition of "child" is provided by § 416(h)(2)-(3).

[3] Throughout our discussion of entitlement to benefits, we assume that the applicant child satisfies age, marital and filing requirements and has not been legally adopted by another.

individual from whom he could inherit. § 416(h)(2)(A). However, by the provisions of § 402(d)(3), such a child is not deemed legitimate and hence is not deemed dependent. Thus, as we read these provisions of the Act (which appears to be contrary in part to the Supreme Court's reading to which we will address ourselves later), a child seeking to show eligibility for benefits on the basis of the right to intestate succession must also show that he was living with or supported by the insured individual. § 402(d)(3).

Similarly, where a child cannot show eligibility under any of the foregoing provisions, eligibility may be shown by evidence satisfactory to the Secretary that the insured individual was the father of the child and lived with or contributed to the support of the child at the time of death. § 416(h)(3)(C)(ii). It is this provision that Norton attacks.

The Effect of Jimenez Upon Our Prior Decision

At the outset, two points concerning *Jimenez* may be easily stated. First, the Supreme Court did not use *Jimenez* as a vehicle for holding that illegitimacy is a "suspect classification" which requires "strict scrutiny" analysis. Rather, the Supreme Court expressly refused to reach that issue. *Jimenez* at 631-32. Thus, we see no reason to alter our prior opinion in that respect. *See Norton* v. *Weinberger*, 364 F. Supp. 1117, 1122 (D.Md. 1973).

Second, we do not read the Court's opinion in *Jimenez* to require any change in our previous conclusion that the primary purpose of the Social Security Act is to aid children who are actually dependent, as opposed to potentially dependent. Indeed, if anything, the Supreme Court appears to concur in our assessment of the statute's goal. In *Jimenez*, the Court stated in simple terms that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." *Jimenez* at 634. If, as plaintiff suggests, the Supreme Court had meant that the primary purpose was to aid potential dependents or to aid all children who have not been adopted by third persons, we believe that it would have said so more directly. Also, the Court would not have remanded for proceedings to determine whether or not the disabled father

lived with or contributed to the support of the Jimenez children. In any event, the plaintiff's construction of congressional intent would make utterly inexplicable the complex provisions of the statutory scheme. Surely if Congress had intended to aid all children regardless of dependency it could have said so without devoting approximately 80 lines of the statute's text to defining who is deemed "dependent." *See* 42 U.S.C. §§ 402(d)(3), 416(h)(2)(B), 416(h)(3).

Turning from those specific points to the general constitutional analysis by the Court, we find nothing which would require us to change our prior decision. As we interpret the Court's opinion in *Jimenez*, the thrust of that opinion was that Eugenio and Alicia Jimenez, and the members of their class, could not be refused benefits without their first being afforded a realistic opportunity to prove that they were living with their parent or supported by him. In other words, the Court did not hold that Eugenio and Alicia were entitled to the same presumption of dependence as is afforded to certain other children. Instead, it merely ruled that, in light of the rest of the statutory scheme, after-born children in Eugenio and Alicia's class, may not be required to prove the impossible, i.e., dependence prior to their conception. *See Jimenez* at 636-38.

That general analysis by the Supreme Court in *Jimenez* has no application to *Norton* for two reasons. In the first place, unlike Eugenio and Alicia Jimenez, the plaintiff here is not now, and never has been, dependent upon his father. Thus, in contrast to the Jimenez children, Norton has not been arbitrarily denied benefits despite actual dependency. Norton was denied benefits because, in fact, he never was dependent and because Congress never intended to aid Norton's class of nondependents.

In the second place, it is manifest that the narrow form of discrimination which was dealt with in *Jimenez*—i.e., discrimination against certain after-born children—cannot possibly arise in the context of survivors benefits. It will be recalled that in *Jimenez*, the plaintiff children were in fact dependents at the time they applied for disability benefits, but they were denied benefits because, as they were after-conceived and after-born, they could not possibly prove that their father was living with them or contributing to their support at the time of the onset of his disability. By contrast, in the context of death benefits, no child is conclusively barred from recovering benefits solely because of the timing of his birth. Each child has a realistic opportunity to prove dependency at the requisite time for the obvious reason, that once deceased, the alleged parent is not going to father any more children. Thus, in the context of survivors benefits, only nondependents will fail to recover. Even the hypothetical child who is conceived prior to his father's death, but who is born afterwards, will recover if, at the time of his death, the father was living with the then-pregnant mother or was contributing to her support. *See Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1964).[4] Accepting the rationale of the Fifth Circuit in *Wagner* v. *Finch*, *supra*, not only do we view Norton's complaint as different from that of the Jimenez children, we can perceive of no situation where a child of a deceased insured could ever pose the problem raised in *Jimenez*.

The statutory scheme for survivors benefits may be "overinclusive" in that some nondependents can recover benefits but it is not "underinclusive."[5] That is, although there will, of course, be *nondependent* children who cannot recover, there will be no *dependent* children who are unable to prove dependency at the requisite time. Consequently,

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[4] It is worth noting that in the Supreme Court's opinion in *Jimenez*, the Court wrote that Eugenio and Alicia's older sister, Magdalena, was entitled to benefits for her father's disability "because she had been *conceived* before Jimenez became disabled. . . ." Jimenez v. Weinberger, 417 U.S. 628, 631 (1974). (Emphasis added). Since we know from the district court opinion that, in fact, Magdalena had been *born* prior to her father's injury, the Supreme Court's choice of the word "conceived" appears to signify acceptance of the reasoning in Wagner v. Finch. *See* Jimenez v. Richardson, 353 F.2d 1356, 1358-59 (N.D.Ill. 1973) (per curiam).

[5] Norton, a nondependent child, cannot argue that the scheme for benefits denies equal protection merely because the statute's categories enable some nondependent children to get a free ride. The statute need not be perfectly drawn. It is enough that the statute's classifications are substantially and rationally related to the Act's permissible purpose, that it infringes on no suspect classifications, and that no conclusive presumptions operate to exclude arbitrarily those whom the statute is designed to aid.

the Supreme Court's narrow equal protection analysis in *Jimenez*—turning as it does upon the irrational exclusion of certain *after-born dependent* illegitimates from the class of dependent children generally—has no impact here nor upon any child seeking survivors benefits.

Finally, while we do not believe that the Supreme Court's constitutional analysis in *Jimenez* requires us to modify either the results or the analysis of our prior opinion, another aspect of the *Jimenez* opinion requires some additional comment. As indicated above, our prior decision in this case was premised upon our conclusion that the statutory scheme of classifications and presumptions was substantially and rationally related to the Act's purpose to aid dependent children of deceased wage earners. Accordingly, it is crucial that our understanding of the statute's classifications and presumptions was correct. With that in mind we must deal with a discrepancy between a narrow part of our interpretation of the Act and a part of the Supreme Court's description of the Act in *Jimenez*. The difference arises over whether or not an individual who has the status of child under the laws of intestate succession in the insured individual's state of domicile is automatically deemed dependent. While we thought not, *Jimenez* might suggest otherwise. *See* §§ 402(d)(1), 402(d)(3), 416(h)(2)(A). *Compare Jimenez* v. *Weinberger*, 417 U.S. 628, n.2 at 631, 635-36 (1974), *with Norton* v. *Weinberger*, 364 F. Supp. 1117, 1119 (D. Md. 1973).

Before discussing the discrepancy, we should note that, as we read its opinion, the Court's description of the portion of the Act in question was in the nature of general background. Therefore, it does not appear to have been necessary to the Court's conclusion that the Act unconstitutionally denied the after-born Jimenez children an effective opportunity to prove their dependency. While we proceed with caution and deference, we reiterate our belief that the part of the discussion in *Jimenez* which we have noted was not essential to the holding.

In analyzing this issue of statutory interpretation, we have reviewed again the language of the Act. Furthermore, we have searched the history of amendments to the Act in order to trace the development of insurance benefits for children,[6] and we have read pertinent portions of the legislative history. After this analysis, we have again returned to our earlier view that a child of an insured individual is not deemed "dependent" by the Act merely because he happens to be eligible to inherit personalty under the laws of intestate succession in the insured's state of domicile.[7] In our view, both the language of the Act and its history support the conclusion that state laws of intestate succession are invoked by § 416(h)(2)(A) merely to provide the Secretary with a method for determining who is a "child" of an insured individual and not for determining who is a "dependent" child.

Treatment of this issue of statutory meaning is best accomplished by quoting the relevant portions of the statute. Section 402(d)(1), the basic recovery section, provides in relevant part:

> § 402(d)(1)
>
> Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
>
> . . .
>
> (C) was dependent upon such individual—
>
> . . .
>
> shall be entitled to a child's insurance benefit. . . .

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[6] *See* Social Security Act Amendments of 1950, Ch. 809, §§ 202(d)(1), 202(d)(3), 216(h)(1), 64 Stat. 483-84, 511 (1950); Social Security Amendments of 1958, Pl. 85-840, § 205(d), 72 Stat. 1022 (1958); Social Security Amendments of 1960, Pl. 86-778, § 208(b)-(d), 74 Stat. 951 (1960); Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pl. 89-97, § 339(a)-(b), 79 Stat. 409 (1965).

[7] This is significant to the ultimate result in *Norton* because, if an individual were deemed dependent due to the unrelated circumstance that he is favorably treated under his state's intestacy laws, a significant question would be raised about the rational basis for the statutory scheme.

Thus, according to § 402(d)(1), a "child" must be "dependent" in order to be entitled to benefits.

In turn, §§ 416(e), 416(h)(2), and 416(h)(3) define who is a "child" for purposes of distributing these insurance benefits. Section 416(e) provides an initial definition of the term "child" which, in addition to natural and adopted children, reaches certain stepchildren and grandchildren. For our purposes, it is enough to quote the opening words of § 416(e): "The term 'child' means (1) the child or legally adopted child of an individual. . . ."

As § 416(e) provides little guidance, one must turn to §§ 416(h)(2) and (h)(3) for further explication of the term "child." Section 416(h)(2)(A) provides:

§ 416(h)(2)(A)

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death. . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

Continuing, the Act states

§ 416(h)(2)(B)

> If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

Finally, it adds

§ 416(h)(3)

> An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
>
> . . .
>
> (B) in the case of an insured individual entitled to disability insurance benefits . . .
>
> (i) such insured individual—
>
> (I) has acknowledged in writing that the applicant is his son or daughter,
>
> (II) has been decreed by a court to be the father of the applicant, or
>
> (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,
>
> and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or
>
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began;
>
> (C) in the case of a deceased individual—
>
> (i) such insured individual—
>
> (I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

It can be seen from the above-quoted sections that only a "dependent" child recovers, § 402(d)(1), and it can also be seen who meets the definition of "child," §§ 416(e), 416(h)(2)-(3). It is lastly necessary to determine who is deemed by the Act to be "*dependent.*" Section 402(d)(3) is the critical provision for defining "dependent":

§ 402(d)(3)

A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual. (Emphasis added).

Translation of the awkward series of negatives in the first sentence of § 402(d)(3) leads to a simpler basic formula—a child is deemed dependent (a) if his insured parent lived with him or contributed to his support or (b) if he is the legitimate or adopted child of the insured parent and he has not subsequently been adopted by a third person. Nothing in the first sentence exempts a child who can inherit under state intestacy laws from showing that the insured parent was living with him or contributing to his support.

Likewise, the second sentence of § 402(d)(3) does not deem to be legitimate (and, therefore, dependent) a child seeking to show eligibility under the intestate succession language of § 416(h)(2)(A). To the contrary, while the second sentence of § 402(d)(3)(A) expressly deems to be legitimate (and, therefore, dependent) children who qualify under §§ 416(h)(2)(B) and 416(h)(3), no reference is made to individuals who meet the definition of "child" under § 416(h)(2)(A). The omission of any reference to § 416(h)(2)(A) is conspicuous and, moreover, it is consistent with the evolution of these provisions of the Act.[8] Thus, an applicant for benefits who is a "child" under § 416(h)(2)(A) (i.e., one who has the status of a child under state intestacy laws), without more, still has to prove that the parent was living with or contributing to the support of such child.

On the basis of the above-quoted statutory language, we do not think it necessary to modify our earlier opinion with regard to our assessment of the rationality of the statute's classification scheme. Absent constitutional infirmity, we hold no warrant to eviscerate a congressionally enacted plan to provide benefits to children of individuals insured under the Act. We perceive no such infirmity.

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[8] *See* footnote 6, *supra.*

Conclusion

For the reasons stated above, we reaffirm our previous opinion and summary judgment will be entered separately in favor of the defendant.

/s/ Herbert F. Murray
Herbert F. Murray
United States District Judge

/s/ C. Stanley Blair
C. Stanley Blair
United States District Judge

WINTER, Circuit Judge, dissenting:

I respectfully dissent. In my view the decision in Jimenez v. Weinberger, 417 U.S. 628 (1974), requires us to alter our decision in Norton v. Weinberger, 364 F.S. 1117 (D. Md. 1973), vacated and remanded, 417 U.S. —— (1974) (*Norton I*), and to hold that the portion of the statute attacked denies equal protection of the laws and should be declared invalid. Since the Secretary has found that the deceased wage earner, Gregory B. Norton, Sr., was the father of the claimant, I would remand the case to the Secretary with directions to award the claimed survivor's benefit.

I.

I begin with an analysis of *Jimenez*, interspersed with comments on how it supersedes our prior holding. In *Jimenez*, the claimants, or applicants for disability benefits, were the illegitimate children of a disabled wage earner. They had been born after the onset of the wage earner's disability. The statutory scheme in *Jimenez* provided that when a wage earner suffers "disability," defined elsewhere in the Act, his legitimate children, under certain ages or under a disability themselves, are entitled to benefits if, *inter alia*, they were dependent on the disabled wage earner. § 202(d)(1) of the Act, 42 U.S.C. § 402(d)(1). Legitimate children are deemed dependent on the disabled wage earner irrespective of whether they live with him or he contributes to their support. § 202(d)(3) of the Act, 42 U.S.C. § 402(d)(3). By certain of the provisions of § 216, 42 U.S.C. § 416, which bear a marked similarity to the other provisions of § 216 which were considered in *Norton I*, certain illegitimate children can also recover benefits, i.e., illegitimate children entitled to inherit under the intestacy laws of the state (42 U.S.C. § 416(h)(2)(A)),[1]

[1] In *Jimenez*, it is stated flatly that "[u]nder the statute it is clear that illegitimate children born after the wage earner becomes disabled qualify for benefits if state law permits them to inherit from the wage earner, § 416(h)(2)(A)." 417 U.S. at 634. With protestations of due deference and respect, the majority opinion

children not entitled to inherit only because of some formal defect in their parents' marriage (42 U.S.C. § 416 (h) (2) (B)), and illegitimate children if the wage earner's paternity has been established, prior to the beginning of disability, by formal acknowledgment, court order for support, or court decree of paternity (42 U.S.C. § 416 (h) (3) (B) (i). In the case of these classes of illegitimates as well, the statute deems them dependent on the disabled wage earner irrespective of whether they live with him or he contributes to their support. If a claimant

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undertakes to prove the statement inaccurate, as indeed it concedes that it must in ordr to preserve its thesis that Gregory B. Norton, Jr., has not been the subject of invidious discrimination. Majority opinion, n. 7.

I think the Supreme Court's statement accurate: § 402(d) (1) requires, *inter alia*, that a "child," to be entitled to a child's insurance benefit, "dependent" upon the insured person entitled to an old-age or disability insurance benefit. By § 402(d) (3), so far as pertinent, a child is deemed dependent upon his father unless his father was not living with or contributing to his support *and* the child is neither the legitimate nor adopted child of the father. Section 416(h) (2) (A), however, states that "[i]n determining whether an applicant is the child . . . of a fully or currently insured individual . . . ," the Secretary shall apply the law relating to the devolution of intestate property in which the insured individual is domiciled. It then states, "[a]pplicants who according to such law would have the same status . . . as a child . . . *shall be deemed such*." (Emphasis added.) The "child" that they are thus deemed to be is defined in § 416(e) to mean "the child or legally adopted child of an individual . . . ."

I read the statutes together to mean that an illegitimate who would inherit from his father under applicable state intestacy law is to be deemed a "child," and since he is deemed to be a "child," he is deemed dependent under § 402(d) (3). Even if he does not live with his father or is not supported by his father, the child does not fit into the exception in § 402(d) (3) for illegitimate or non-adopted children, because, by § 416(h) (2) (A), he is deemed to have the status of a legitimate child who may inherit. The fact that § 402 (d) (3) makes special provision for illegitimates of the categories defined in §§ 416(h) (2) (B) and 416(h) (3), but not § 416(h) (2) (A), is not significant, because, again, § 416(h) (2) (A), as I read it, says that illegitimates who can inherit under state intestacy law are deemed to have the status of legitimate children (thus, rendering any further special treatment unnecessary), while §§ 416(h) (2) (B) and 416(h) (3) do not.

fits none of these categories, the claimant is still entitled to benefits if the claimant can demonstrate paternity in fact *and* that the wage earner was living with or contributing to the support of the claimant *when the period of disability began* (42 U.S.C. § 416(h) (3) (B) (ii).

In *Jimenez*, the latter provisions were under attack—(a) that which required the birth of the child *before disability began*, and (b) that which imposed the condition of "living with" or "contributing to the support of" the claimant *disability of the wage-earner began*—even though paternity of the claimant had been established by evidence satisfactory to the Secretary. *Jimenez* held that the complete bar to after-born illegitimates denied equal protection of the law.[2] It gave strong and clear indications that imposition of either of the alternatives of "living with" or "contributing to the support of" was similarly invalid.

In arriving at its holding, the Court declined to prescribe the quantum of proof which would be required to sustain a discrimination among illegitimates in the context of social security benefits.[3] The Court adopted, as

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[2] In a suit of this nature between an individual and the federal government, the constitutional guarantee at issue is the fifth amendment and it, unlike the fourteenth amendment, contains no equal protection clause. However, it is established that the guarantee of equal protection of the laws is part of the concept of "due process" which the federal government must afford. Schneider v. Rusk, 377 U.S. 163, 168 (1964; Bolling v. Sharp, 347 U.S. 497, 499 (1954).

[3] The Supreme Court declined to declare illegitimacy a "suspect classification" requiring "strict scrutiny," 417 U.S. at 631-32, because it found that the discrimination in *Jimenez* was unconstitutional even under the somewhat looser and vaguer standard articulated in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-76 (1972): "the classification is justified by no legitimate state interest compelling or otherwise." There are, however, numerous indications in recent Supreme Court opinions that, in a proper case, a majority of the Court would find that illegitimacy was a suspect classification. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 60 (1973) (concurring opinion); Id. at 108 (dissenting opinion); Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (dissenting opinion). I, too, see no need to decide the issue, because I

basic, the premise that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." [4] 417 U.S. at 634. Accordingly, it firmly and explicitly rejected the argument (on which *Norton I* is premised) that the "requisite economic dependency" within the purposes of the legislation is limited to actual support received prior to the event insured against, which, in *Jimenez*, meant prior to disability. 417 U.S. at 634.[5] No such showing, the Court

would conclude that the discrimination presented here fails under the *Weber* and *Jimenez* standards. I fear, however, that from the language of the majority opinion, n. 5, that the majority harbors notions that the "rationally related" test of Dandridge v. Williams, 397 U.S. 471 (1970), has some application to his case. I call attention that application of *Dandridge* was specifically rejected in *Jimenez*. 417 U.S. at 632-34.

[4] *Citing* the House-Senate Committee Conference Report on 1965 Amendments to the Social Security Act, 111 Cong. Rec. 18387 (July 27, 1965); and the Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommentdations for its Improvement, 67 (Washington, D.C., 1965). These documents speak of the Act as providing benefits if the insured father had an "obligation" or a "legal obligation" to support the child. In *Norton I*, the importance of this language in assessing the purposes of the Act was under-estimated. There, the Court said only that it is "descriptive of the Act's effect." 364 F.S. at 1127, n. 6.

[5] The language of the Court, apparently overlooked by the majority, could not be more specific:

> The Secretary maintains that the Act denies benefits to . . . [certain classes of illegitimates] because it is "likely" that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner which would entitle them to recovery under the Act . . . . Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability; . . . . *We do not read the statute as supporting that view of its purpose.* (Emphasis supplied.)

417 U.S. at 634.

The court's reliance in *Norton I* on this discredited view of the purpose of the Act was expressed at several places in its previous opinion. See, e.g.:

> The purpose of the Act, consistent with this dual concept, is to replace the support lost to a child when a wage earner dies.

364 F.S. at 1127.

pointed out, is required of either legitimate children or any other class of illegitimates.[6] Indeed, even under § 416(h)(3)(B)(ii), a claimant can establish entitlement to benefits without showing actual support if he can demonstrate paternity and the fact he was living with the wage earner prior to the period of disability. Furthermore, the Court's opinion rejected the Secretary's attempt to justify a requirement that illegitimates be born before the wage earner's death to entitle them to benefits on the basis that such claimants are less "likely to have the requisite economic dependency." [7] The Court went further and stated that "[e]ven if children might be rationally classified on the basis of whether they are dependent on their disabled parent," the statutory scheme was both "under-inclusive" and "over-inclusive"—"deeming dependent" in some instances those who are not, and excluding in others those who are.[8] Thus, the Court found

[6] It said:

> Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent.

417 U.S. at 637.

[7] 417 U.S. at 634, 637. In *Norton I*, the Court stated that it was "rational" for the statutory scheme to assume that the classes of children "deemed dependent" were the recipients of actual support, and likewise rational to require applicants in plaintiffs' class to prove that fact. 364 F.S. at 1128. Deference was granted to the factual assumptions underlying the statutory scheme in reliance, *inter alia*, on Dandridge v. Williams, 397 U.S. 471, 485 (1970). In *Jimenez*, however, the Court held that the *Dandridge* reasoning was inapplicable because "the purpose of the statutory exclusion of some afterborn illegitimates . . . [was not] to achieve a necessary allocation of finite resources . . ." 417 U.S. at 634. In effect, a heavier and insupportable burden of justification was placed on the federal government than was placed on state governments in *Dandridge*, and the assumptions which were declared adequate to support the statutory classifications in *Norton I* were rejected by the Supreme Court in *Jimenez*. Compare *Norton I*, 364 F.S. at 1128, with *Jimenez*, 417 U.S. at 634.

[8] See note 6 supra. It is clear that the instant case presents the same problem of "over-inclusiveness" with regard to dependency. The government has argued, however, that the converse problem

that these after-born illegitimates were on the "same footing" with regard to the purpose of the statute (to provide for dependents of insured wage earners) as others whose claim to benefits was conceded. The difference in treatment was, therefore, a denial of equal protection.[9] The Court remanded the case to the district court to allow the Secretary to contest the assertions of paternity, support, and acknowledgment of claimants, issues which he had not contested in the district court because he had defended the denial of benefits on the statutory exclusion of illegitimates born after the wage earner's disability.

As I have noted, the statutory definitions of eligibility about which *Jimenez* and *Norton I* revolved—§ 416(h)(3)(B) and (C), respectively—are, except for the event insured against, identical. Once actual paternity was established, the only difference between the requirement that plaintiff in the instant case must satisfy and that which the Jimenez children were obliged to meet, if the statute is read literally, is that, in the instant case, the crucial date is the date of death, while in *Jimenez* the crucial date was the beginning of disability. Otherwise, the requirement that the wage earner must be living with, or contributing to the support of, the applicant, is the

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of under-inclusiveness is not presented because all claimants who were actually supported by the insured individual, or lived with him prior to his death would be eligible for benefits, including children conceived before, but born after, the death of the insured individual, Wagner v. Finch, 413 F.2d 267 (5 Cir. 1969). Even conceding the soundness of *Wagner's* holding that a child *en ventre sa mere* is living with the father when the father and the mother are living together, the government's argument cannot avoid the fact that many illegitimates who could prove neither actual dependency nor co-residence are concededly entitled to benefits. Of course it is not necessary that a statute be both under and over-inclusive for it to deny equal protection. In any event, the premise of the government's argument is unsound, because in *Jimenez* it was stated that the purposes of the Social Security Act as a whole do not depend on actual contribution. Thus, to exclude Norton's claim on the basis of the absence of that factor is simply without rational basis; and this is true whether or not all the children who received actual suport from deceased wage earners can recover or not.

[9] 417 U.S. at 637.

same in both cases. In both cases, an illegitimate claimant was denied benefits by the Secretary because he had received no "actual contribution" to his support prior to the statutory cut-off date, and in both the Secretary maintained that it was rational to demand proof of actual support in that sub-class of illegitimates because it was less likely to be present than in other classes. Since Norton is treated differently from other classes of claimants on the same grounds which the Supreme Court held were inadequate to justify the different treatment of the *Jimenez* applicants, I would conclude that Norton is being denied equal protection of the law as well.

II.

I turn to two factors on which the majority relies to distinguish *Jimenez* from the instant case. The first is that *Jimenez* was concerned with children born (or conceived) *after* the wage earner's date of disability, while the instant case concerns a child born *before* the date of death. Thus, it was physically impossible for the wage earner to contribute to the support of the *Jimenez* claimants, or to live with them, prior to the beginning of his date of disability. By contrast in *Norton*, Norton, Sr. could have contributed to the support of Norton, Jr., but did not; and Norton, Sr. could have lived with Norton, Jr. had Norton, Sr. not been in military service and stationed overseas. As a result, the majority reasons that when viewed against the background of the majority's conviction—mistaken, I think—that the Act was designed to replace *only* loss of *actual* support, plaintiff has not been the subject of invidious discrimination.

The second is the Court's actual disposition of *Jimenez*, i.e., the remand to permit the claimants to establish, in an adversary proceeding, the truth of their allegations that they were the children of the disabled wage earner, that they lived with him all of their lives, that he acknowledged them as his children, and that he supported and cared for them since their birth. The significance of this disposition is that these are the very factors which would have made them eligible for benefits had they been present prior to the date of the wage earner's disability.

On the basis of both of these distinctions, the majority, in effect, infers that only the validity of the cut-off date, i.e., the date of the wage earner's death, was the point of decision in *Jimenez*: the Court was not invalidating the requirement that the wage earner live with or contribute to the support of the claimant as a condition of the claimant's eligibility—it was merely extending the time-span in which these conditions could be met. Thus, the *Norton I* result is unaffected, so the majority concludes, because Norton, Sr. could obviously not "live with" or "contribute to the support of" plaintiff after the former's death.

While I agree that *Jimenez* does not invalidate, *per se*, the alternate requirements of co-residence or actual support as conditions of eligibility, its reasoning, as well as its language, lead inevitably to that conclusion. It is true that the Court remanded the case to permit the claimants "to establish their claim to eligibility as 'children' of the claimant," 417 U.S. at 637-38, and this I read to require a showing of dependency. But the opinion seems to make clear that, under the Act, actual support is not a necessary aspect of the concept of dependency. As I have previously stated, the legislative history the Court cites for "the primary purpose" of the Act speaks of the "right to support," [10] and the opinion emphasizes in particular the inconsistency and injustice of requiring this particular sub-group of illegitimates to make a similar showing of any other class of applicants.[11] At another point, the Court seems to equate "dependency," "claim to support," and "right to eligibility." [12] Of course, a claim to support, or a right of support

[10] See n. 4, supra.

[11] 417 U.S. at 634, 636-37.

[12] The Court said:

> Their dilemma is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their "claim" to support and hence, their eligibility.

417 U.S. at 635. While it is difficult to be sure of what this means, the phrase "claim to support" is pointless in the sentence if it is not the counterpart of both dependency and eligibility.

arises from the fact of paternity alone, and it is only the fact of paternity that other sub-classes of illegitimates are required to establish (by formal acknowledgment, court order, or court decree) in order to receive benefits. To me, it seems an inescapable conclusion from the premise that the Act was designed to provide a substitute for loss of the *right* to support, and not merely a substitute for loss of *actual* support, that proof of paternity alone, which gives rise to the right to support, is all that is needed to entitle this sub-class of illegitimates to benefits, that the purposes of the Act are fully served by proof of paternity alone and that a requirement of proof of more by this sub-class of illegitimate claimants results in invidious, unequal treatment. This I conceive to be the real thrust of *Jimenez* which the majority misses.[13]

I place no contrary significance on the terms of the remand in *Jimenez*. The remand merely referred inclusively to the allegations made by the claimants in support of their claim; it did not purport to establish a standard of eligibility. Although the claimants had alleged as facts all of the issues that the remand directed to be explored, none had been previously considered or litigated, because of the undisputed fact that the birth of two of the children had followed the beginning of the wage earner's disability by two and five years, respectively. It seems fairly obvious that since the provision of the statute making the fact of subsequent birth an automatic disqualification was in-

[13] Unlike the majority, I am not disturbed by the fact that this conclusion renders superfluous "approximately 80 lines of the statute's text . . . defining who is deemed 'dependent.'" It must be remembered that the Act, not simple in form at the time of its original enactment, has grown by accretion over a time span of approximately forty years. It is not surprising that in this period there have been refinements, extensions and modifications of congressional purpose and that there may be surplusage in congressional articulation. Unquestionably, there is other overlap between §§ 416(h)(2)(B) and 416(h)(3). What impresses the majority is more an argument for the need for restatement of the terms and provisions of the Act than a reason not to give effect to the Fifth Amendment.

validated, it was appropriate to order a full adversary evidentiary exploration of all of the allegations to determine what sort of case the claimants could prove and what statutory standards governing eligibility would be applicable. The Court did not say that all of the allegations must be proved for the claimants to recover; and I do not infer that the Court meant that all, or even some combinations, of the allegations must be proved by the *Jimenez* claimants to establish their entitlement to benefits. This is so because there can be no question that certain combinations—for example, formal acknowledgment of paternity and actual support—are plainly more than what is required under the Act once the limitation on the time of acknowledgment was removed. Moreover, although the remand directs attention to allegations beyond actual paternity, such facts as coresidence, acknowledgment and support, if proved, could be persuasive corroboration of actual paternity and therefore highly relevant to the determination of that basic issue. Surely the Secretary would be entitled to consider them in determining whether paternity was established "to [his] satisfaction." 42 U.S.C. § 416(h)(3)(B)(ii). The terms of the remand, thus, are not inconsistent with my conclusion that for the sub-class of illegitimates, of which plaintiff is a member, proof beyond that of paternity of the deceased wage earner may not be constitutionally required.

III.

For these reasons, I would enter a judgment declaring unconstitutional the portion of § 216(b)(3)(C)(ii) of the Act, 42 U.S.C. § 416(h)(3)(C)(ii), which requires proof that "such insured individual was living with or contributing to the support of the applicant at the time such insured individual died." I would also remand the case to the Secretary, with the direction that plaintiff's claimed benefits be allowed dating from the death of Gregory B. Norton, Sr., because I see no need for further evidentiary proceedings.

In proceedings prior to the action to review, the Secretary found that Norton, Sr. was the plaintiff's father. As the court's opinion in Norton v. Richardson,

352 F.S. 596 (D. Md. 1972), demonstrates, the evidence supporting this finding was not insubstantial. This is not a case where only the surviving mother claims that a deceased wage earner was the father of her child. By his act and deed, Norton, Sr. conceded paternity prior to his death, even to the point of taking positive, but legally ineffective, steps to provide a military allotment for the support of his son. On this record, unlike *Jimenez*, there is no need for further litigation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

v.

CASPAR W. WEINBERGER, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

ORDER

This matter having come before this court on remand for further consideration, after judgment for defendant was vacated by the Supreme Court of the United States, and this court having considered *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), this court's previous decision, the pleadings, briefs filed by the parties, and having heard the argument of counsel, and being fully advised of the premises, and this court having concluded that there is no disputed issue of material fact and that the defendant is entitled to judgment as a matter of law, it is hereby this 28th day of February, 1975, again

ORDERED that defendant's Motion for Summary Judgment be and is hereby granted and summary judgment be and is hereby entered in defendant's favor and the action is dismissed and it is

FURTHER ORDERED that plaintiff's Motion for Summary Judgment is denied.

/s/ Herbert F. Murray
Herbert F. Murray
United States District Judge

/s/ C. Stanley Blair
C. Stanley Blair
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 72-271-B

GREGORY NORTON, JR., ETC., PLAINTIFF

vs.

CASPAR W. WEINBERGER, DEFENDANT

NOTICE OF APPEAL

Filed March 17, 1975

Notice is hereby given that Gregory Norton, Jr., by his next of friend, Marian B. Chiles, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered in this action on February 28, 1975, denying relief to plaintiff and granting defendant summary judgment.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ C. Christopher Brown
C. CHRISTOPHER BROWN
Legal Aid Bureau, Inc.
341 North Calvert Street
Baltimore, Maryland 21202
Telephone: 685-1112
Attorney for Plaintiff

SUPREME COURT OF THE UNITED STATES

No. 74-6212

GREGORY NORTON, JR., ETC., APPELLANT

v.

CASPAR W. WEINBERGER,
Secretary of Health, Education and Welfare

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 30, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion.

SUPREME COURT OF THE UNITED STATES

No. 74-6212

GREGORY NORTON, JR., ETC., APPELLANT

v.

CASPAR W. WEINBERGER,
Secretary of Health, Education and Welfare

APPEAL from the United States District Court for the District of Maryland.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. See Weinberger v. Salfi, No. 74-214, n. 8 (June 26, 1975).

June 30, 1975

Mr. Justice Douglas took no part in the consideration or decision of this appeal.

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No. 74-6212

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

GREGORY NORTON, JR., APPELLANT

v.

CASPAR W. WEINBERGER, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

MEMORANDUM FOR THE APPELLEE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6212

GREGORY NORTON, JR., APPELLANT

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MEMORANDUM FOR THE APPELLEE

STATEMENT

1. This suit challenges the constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii), insofar as those provisions condition certain illegitimate children's receipt of child's insurance benefits upon a showing that a deceased male wage-earner was their father and was, at the time of his death, living with them or contributing to their support.

Child's insurance benefits are payable to children under the age of 18 (or, in the case of full-time students, under the age of 22) who were dependent upon the deceased wage-earner at the time of his death. Section 202(d)(1)(C) of the Act.[1/] Dependency upon a deceased father is presumed in the

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1/ The pertinent statutory provisions are set forth in the appendix to J.S. App. C.

case of legitimate children who have not been adopted by another man. Section 202(d)(3) of the Act. Such dependency is also presumed in the case of an illegitimate child (1) whose parents went through a marriage ceremony that was rendered invalid by a non-obvious legal impediment or (2) whose father (a) acknowledged his paternity in writing, (b) had been decreed by a court to be the child's father, or (c) had been ordered by a court to support the child. Sections 202(d)(3) and 216(h)(2) and (3) of the Act.

Children not falling in any of the above categories, i.e., legitimate children who have been adopted by another man and other illegitimate children, are not presumed to have been dependent upon their fathers. In order to receive child's insurance benefits, such children must show that the deceased wage-earner was their father and that, at the time of his death, the wage-earner had been living with them or contributing to their support. Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act.

2. Appellant, Gregory Norton, Jr., filed a claim for child's insurance benefits upon the death of Gregory Norton, Sr. The claim was tried initially by a hearing examiner of the Department of Health, Education, and Welfare. Appellant conceded that Gregory Norton, Sr., was not his legitimate father. His principal contention was that "the deceased wage earner was [his] biological father * * * and that [he] * * * was living with or being supported by the father at the

father's death" (App. 11).[2/] The hearing examiner found that the evidence clearly established that Gregory Norton, Sr. was appellant's father but that the deceased father had not been living with his son at the time of death (App. 12). The critical issue considered by the hearing examiner was whether the deceased father had been contributing to appellant's support.

There was no evidence that the deceased father had significantly contributed to appellant's support. Appellant's case rested in large part upon the claim that the father, a combat soldier, had been in the process of obtaining a military pay allotment for his son at the time of his death. There was evidence that the father had written Mrs. Mary R. Evans, stating that he knew appellant was his son and requesting appellant's mother's address so that she could send him appellant's birth certificate, so that he could designate appellant as the beneficiary of his military insurance policy (App. 49, 87). The hearing examiner "acknowledge[d] that the wage earner in a letter asked for the birth certificate of the child and that record of birth was found with his personal effects" (App. 13). However, appellant's claim was denied because "[n]o allotment of support was made by Gregory B. Norton on behalf of Gregory B. Norton, Jr. prior to [the] date of his death, May 19, 1966" (ibid.).

2/ "App." refers to the bound appendix in the district court, a copy of which is being lodged with the Clerk of this Court.

3. Appellant then brought this class suit in the United States District Court for the District of Maryland for review of the denial of benefits. Appellant contested the finding that the deceased father was not contributing to appellant's support and alternatively asserted that Congress' failure to extend the presumption of dependency to all illegitimate children denied equal protection of the law. He requested declaratory and injunctive relief on behalf of himself and all persons similarly situated.

A single-judge district court determined that the administrative denial of benefits was supported by substantial evidence (J.S. App. A). Appellant's constitutional claim was then referred to a three-judge district court pursuant to 28 U.S.C. 2282 and 2284. That court concluded that the statutory requirement that certain children establish actual dependency as a condition of receiving child's insurance benefits bears a direct and substantial relationship to the statutory purpose of replacing the support lost by a child upon the wage-earner's death (J.S. App. C). This Court vacated and remanded for consideration in light of the intervening decision in Jimenez v. Weinberger, 417 U.S. 629. 418 U.S. 902. The district court, with one judge dissenting, again sustained the constitutionality of the challenged provisions (J.S. App. D).

DISCUSSION

1. We believe that the district court correctly rejected appellant's constitutional claim, for the reasons set forth

in its thorough opinion upon remand. We nevertheless do not oppose the noting of probable jurisdiction. The constitutional issue raised by appellant is important to the administration of the Social Security Act, and we have been informed by the Department of Health, Education, and Welfare that thirteen cases involving this issue are currently pending in the lower federal courts, awaiting disposition of this case. See, e.g., Adams v. Weinberger, decided November 25, 1974, No. 73C-633 (E.D. N.Y.), appeal pending, No. 75-7098 (C.A. 2) (upholding the statute as constitutional). See also Lucas v. Weinberger, decided March 21, 1975, No. 4845 (D.R.I.), notice of appeal filed April 15, 1975 (holding the statute unconstitutional). This case is therefore an appropriate vehicle for resolution of the constitutional issue that appellant has raised.

2. a. In our view, however, the noting of probable jurisdiction should be limited to the constitutional issue. Appellant's statutory claim for relief, i.e., that the district court erred in sustaining the hearing examiner's finding that appellant's father was not living with him or contributing to his support at the time of his death (J.S. 12-13), has no substantial basis in the evidence (see p. 3, supra) and pertains only to appellant and not to the class that he purports to represent. It is, moreover, an issue the consideration of which would logically precede consideration of appellant's constitutional claim. See Ashwander v.

Tennessee Valley Authority, 297 U.S. 288, 346-348 (concurring opinion of Mr. Justice Brandeis). We see no reason why the Court should undertake plenary review of this essentially factual claim. Accordingly, we believe that the judgment of the district court should be affirmed insofar as it sustains the hearing examiner's conclusion that appellant is not statutorily entitled to receive child's insurance benefits. The only question before this Court should be that of the constitutionality of the statutory scheme.

b. At first blush, the recitation of facts (pp. 2-3, supra) might suggest that appellant and the hearing examiner both overlooked a possible statutory basis for awarding child's insurance benefits, i.e., that appellant's father had acknowledged paternity in writing in his letter to Mrs. Evans.[3/] It is true that the hearing examiner did not expressly address that question. But appellant's counsel had urged, in oral argument before the hearing examiner, that the letter to Mrs. Evans was a written acknowledgement of paternity for purposes of the Act (App. 97), and the hearing examiner nevertheless concluded that although appellant had established that Gregory Norton, Sr. was his father, "there is insufficient evidence of record to establish that other

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3/ The letter itself had been destroyed by Mrs. Evans prior to the hearing (App. 49). But "[i]f clear and convincing evidence shows that the [wage earner] timely acknowledged the child in writing, the requirements are met even if the acknowledgement is no longer in existence or cannot be obtained." Paragraph 2428, HEW manual for hearing examiners.

requirements of the Social Security Act were met so as to entitle [appellant] to benefits" (App. 14).[4/] Accordingly, the question whether appellant's father acknowledged his paternity in writing was tried before the hearing examiner and decided against appellant. Appellant did not challenge that determination on his appeal to the district court and does not here contend that he is statutorily entitled to child's insurance benefits on the basis of a written acknowledgement.

CONCLUSION

Probable jurisdiction should be noted with respect to the constitutional issue raised by appellant. The judgment of the district court should be affirmed insofar as it denies appellant's claim to be statutorily entitled to child's insurance benefits.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

4/ Paragraph 2428 of the HEW manual requires that the evidence of a written acknowledgement be "clear and convincing" (see note 3, supra) and that "[t]he writing must identify the child in question by name or otherwise, and must acknowledge or identify the child as the [wage earner's] son or daughter." Appellant offered only hearsay evidence concerning the content of the letter to Mrs. Evans (see App. 49, 87), and the hearing examiner apparently determined that that evidence did not clearly and convincingly establish that appellant's father had explicitly identified appellant as his son.

Supreme Court, U. S.
FILED
SEP 3 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6212

GREGORY NORTON, JR., ETC.,

Appellant,

v.

F. DAVID MATHEWS,
Secretary of Health, Education,
and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANT

C. CHRISTOPHER BROWN
Legal Aid Bureau, Inc.
341 N. Calvert Street
Baltimore, Maryland 21202

Attorney for Appellant

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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OCTOBER TERM, 1975

No. 74-6212

GREGORY NORTON, JR., ETC.,

Appellant,

v.

F. DAVID MATHEWS,
Secretary of Health, Education,
and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the single district judge on the nonconstitutional aspect of this case is reported as *Norton v. Richardson*, 352 F.Supp. 596 (D. Md. 1972) (App. 22). The original opinion of the three-judge

district court on all aspects of this case is reported as *Norton v. Weinberger*, 364 F.Supp. 1117 (D. Md. 1973) (App. 31). The three-judge district court's majority and dissenting opinions, issued after this Court's remand, 418 U.S. 902 (1974), are reported as *Norton v. Weinberger*, 390 F.Supp. 1084 (D. Md. 1975) (App. 70).

JURISDICTION

A three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 & 2284, entered its final judgment (App. 96) in this case on February 28, 1975, denying appellant's request for an order permanently enjoining enforcement of certain provisions of 42 U.S.C. § 416(h)(3)(C). The notice of appeal to this Court was filed on March 17, 1975 (App. 97). As is explained in Part I, *infra*, this Court's jurisdiction is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether subject-matter jurisdiction vested in the district court so as to require the hearing of this case by a three-judge court and thereby permit appeal to this court pursuant to 28 U.S.C. § 1253.

2. Where paternity is not at issue, whether the provisions of the Social Security Act which require certain illegitimate children to prove actual dependency on a deceased wage earner in order to qualify for social security child's insurance benefits, while irrebuttably

presuming such a showing by legitimate children and other classes of illegitimate children, violate the due process clause of the Fifth Amendment.

STATUTES INVOLVED

42 U.S.C. § 405(g):

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business . . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . .

42 U.S.C. § 405(h):

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

28 U.S.C. § 1361:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

42 U.S.C. § 402(d)(1):

Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child–

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual–

* * *

(ii) if such individual has died, at the time of such death,

* * *

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . .

42 U.S.C. § 402(d)(3):

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such

individual was not living with or contributing to the support of such child and–

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

42 U.S.C. § 416(h)(2) & (3):

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage

ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(b), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * *

(C) In the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

STATEMENT

The appellant, Gregory Norton, Jr., is an illegitimate child who qualified in all respects for child's insurance

benefits pursuant to Section 216(h)(3)(C) of the Social Security Act except that he was found by the Social Security Administration to have failed to establish that his deceased father was living with him or contributing to his support at the time of his father's death, as required by subsection (ii) of that section, 42 U.S.C. § 416(h)(3)(ii) (App. 18). Such proof is not required, and, in fact, irrebuttably presumed, for legitimate children and certain other illegitimate children. If appellant were legitimate or had fallen into the other classification of illegitimate children, he would have been found eligible for child's insurance benefits and now be receiving them.

The Social Security Act sets up two categories of children with respect to proving eligibility for child's insurance benefits. To be eligible, legitimate children need merely establish that their fathers were wage earners covered by the Act and that they were their fathers' children. The Act does not require them to establish any degree of dependency on their fathers since by operation of law they are deemed to have been dependent. *See* 42 U.S.C. § 402(d)(3).

Certain illegitimate children are also irrebuttably presumed dependent on their fathers. This presumption applies to those illegitimate children who are the children of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed, *see* 42 U.S.C. § 402(d)(3) and 416(h)(2)(B); those who establish their fathers' paternity by a written acknowledgement, court paternity decree, or court support order, *see* 42 U.S.C. §§ 402(d)(3) and 416(h)(3)(C)(i); and those who could establish paternity under their state's intestate succession law. *See Jimenez v. Weinberger*, 417 U.S. 628, 631 n.2 (1974).

All other illegitimate children who have satisfactorily established their fathers' paternity are not benefited by this presumption. Instead, they must establish the additional element that they were living with or supported by their father at his death. *See* 42 U.S.C. § § 402(d)(3)(A) and 416(h)(3)(C)(ii).

Appellant was born out of wedlock in 1964 to Gregory Norton, Sr., then 16, and Laurie Marie Brown, then 14 (App. 15). Both teenage parents were high school students living with their respective parents; they never married and never actually lived together (App. 17). At Gregory, Jr.'s birth, his father "contributed $6.00 and some gifts of clothing and other baby habiliments, but never actually undertook the support of the child, being an unemployed student at the time." (App. 26). Soon thereafter Gregory, Sr. entered the Army and, at age 19, was killed while serving in Vietnam (App. 15). Although prior to his death he had made attempts to authorize a military allotment for Gregory, Jr., this procedure was incomplete at the time of his death. (App. 28).

Gregory Norton's application to the Social Security Administration for child's insurance benefits on his deceased father's account was filed in September 1969 (App. 13). After administrative review, an Administration hearing officer found that Gregory had met all of the requirements for child's insurance benefits, including the establishment of his father's paternity, but that he had failed to prove that he had lived with or been supported by his father (App. 18). Because of this failure, he was held to be ineligible for these social security benefits (App. 19). After the Appeals Council of the Social Security Administration declined to review

this case (App. 20), a timely complaint was filed in the district court (App. 3).

In his complaint in this action, Gregory Norton, individually and on behalf of those similarly situated, sought declaratory and injunctive relief on due process and equal protection grounds against the requirement that he and his class establish their fathers' "support and residency" with them in addition to paternity. Alternatively, assuming the constitutionality of this extra burden on illegitimate children, appellant asserted that he in fact had met this statutory requirement and therefore should be entitled to monthly child's insurance benefits.

The district judge initially assigned to the case resolved this latter nonconstitutional issue while sitting as a single district judge. He upheld the Secretary's determination that Gregory Norton's evidence was insufficient to establish that his father had lived with or supported him at the time of his death (App. 22).[1] A three-judge court was then convened to hear the constitutional issue (App. 1).

While acknowledging the propriety of class certification (App. 35),[2] the three-judge court upheld the constitutionality of the extra-proof requirement after

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[1] *Norton v. Richardson*, 352 F.Supp. 596 (D. Md. 1972).

[2] The court certified this case as a class action brought on behalf of:

> all of those persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirements of 42 U.S.C. §416(h)(3)(c)(ii) that they be living with or supported by their father on the date of his death.

concluding that the purpose of the Social Security Act was to provide benefits to actual dependents of deceased wage earners (App. 46-48) and accordingly it was not improper for the Act to presume dependency for those classes most likely to have actually been dependent, while requiring actual proof of dependency from those classes of illegitimate children less likely to have been actually dependent (App. 48). The court concluded that because the dependency requirement placed on appellant's class did not lack a rational relationship to the Social Security Act's purpose or intent, it therefore was not violative of the due process clause of the Fifth Amendment (App. 53).[3]

Acting on appellant's initial appeal, this Court vacated the district court's judgment and remanded the case for reconsideration in light of *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (App. 62).[4] Upon remand, the district court, with one judge dissenting, reaffirmed its original holding. (App. 70).[5] This appeal was then timely noted. (App. 97).

In setting this case for oral argument, this Court postponed its determination of jurisdiction in order that the implications of *Weinberger v. Salfi*, ____ U.S. ____ (1975), regarding appellate jurisdiction in this case could be briefed (App. 99).

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[3] *Norton v. Weinberger*, 364 F.Supp. 1117 (D. Md. 1973).

[4] *See Norton v. Weinberger*, 418 U.S. 902 (1974).

[5] *Norton v. Weinberger*, 390 F.Supp. 1084 (D. Md. 1975).

SUMMARY OF ARGUMENT

I. JURISDICTION

The major jurisdictional issue posed in this case turns on the breadth of the district court's subject-matter jurisdiction. If the district had proper subject-matter jurisdiction and was able to properly utilize it to grant the relief appellant and his class requested–a class-wide injunction based upon a claim of constitutional invalidity preventing enforcement by the Secretary of a part of the Social Security Act–then it was properly convened as a three-judge court pursuant to 28 U.S.C. § 2282. An appeal from its denial of an injunction would then properly lie with this Court. *See* 28 U.S.C. § 1253.

Appellant and his class of illegitimate children submit that subject-matter jurisdiction properly existed under any of three alternative statutory sources: the provision for Social Security Act claims review, 42 U.S.C. § 405(g); mandamus review, 28 U.S.C. § 1361; or the Administrative Procedure Act, 5 U.S.C. § § 701 *et seq.*

The clearest of these bases–42 U.S.C. § 405(g)–was pointed out in this Court's recent opinion in *Weinberger v. Salfi*, ____ U.S. ____ (1975). Appellant has exhausted his full administrative remedies as required by 42 U.S.C. § 405(h). His class, as properly defined, has done so also. Under an analogous line of this Court's cases, it is clear that (1) a district court exercising section 405(g) jurisdiction has the inherent equity power to issue injunctive and class-wide relief and (2) nothing in the Act in any way bars the issuance of this type of relief. Accordingly, because the district court was requested and was empowered to issue

injunctive relief invalidating a portion of the Act on constitutional grounds, it was properly convened as a three-judge court. An appeal from its denial of injunctive relief must therefore be to this Court.

Subject-matter jurisdiction could alternatively exist under 28 U.S.C. § 1361 or 5 U.S.C. § § 701 *et seq.* Neither is specifically prohibited by 42 U.S.C. § 405(h)'s bar to any cases brought pursuant to former section 41 of Title 28. Mandamus jurisdiction has common-law roots and was not a part of Title 28 when section 405(h) was enacted. The provisions for judicial review of administrative actions in Title 5 of the United States Code were similarly not barred by a reference to old section 41 of Title 28. Because the other basic preconditions for these two jurisdictional bases have been met, either could have served the district court in entertaining the requested injunctive relief. These jurisdictional routes would similarly have required the convening of a three-judge court and a consequent appeal to this Court.

Through any of these alternative routes, therefore, appellant and his class are now properly before this Court.

II. THE MERITS

Section 416(h)(3)(C)(ii) of the Act requires appellant's class of illegitimate children to prove both paternity and the fact that they were supported by or lived with their deceased father in order to receive child's insurance benefits on their father's social security account. Legitimate children and other classes

of illegitimate children, however, need only establish their proper paternity; no "support or residency" precondition is required of them.

Appellant and his class contend that this classification is unjustified by any legitimate purpose and accordingly discriminates against them in violation of the Fifth Amendment's due process guarantee.

There appear to be two potential justifications which could be asserted by the Secretary to uphold the validity of this classification against illegitimate children. First, as was adopted by the Secretary and the district court below, the Act's purported purpose was to give child's insurance benefits only to those children more likely to have been actually supported by their father prior to his death. Because appellant's class was not likely to have been supported, while the other classes were likely to have been supported, it is reasonable, the court concluded, to require proof of actual prior support by appellant's class.

Appellant denies, however, that the Act was intended as it applies to illegitimate children to require actual prior support. Rather, the child's insurance program was to serve those orphans who were actually supported or who were entitled to be supported by their deceased father. This being the broader purpose of the program, section 416(h)(3)(C)(ii) has deviated from this purpose by requiring appellant's class—whose fathers owed them a duty of support but never lived up to it—to prove actual prior support. Appellant's view of this broader purpose of the child's insurance program is made clear by reference to the evolution of the "support or residency" requirement in the overall survivors' insurance program beginning in 1939; the specific legislative

history of section 416(h)(3)(C)(ii), which refers to "an obligation" to previously support as well as actual prior support; and the Act's construction which requires no other legitimate or illegitimate children to prove support or residency.

Alternatively, if the program was intended to provide support only to the children of those actually supported by their father prior to his death, this goal was carried out with such arbitrariness and unfairness as to nevertheless be violative of Fifth Amendment due process. Such a scheme could not survive this Court's requirements of heightened scrutiny regarding discrimination against illegitimate children. The program's assumptions as to who was likely to have actually been supported and who was not are without any concrete factual support. Indeed, it is shown that many of them are in reality reversed. The tragic irony of any such purpose would be that it heaps a double injury upon a traditionally disadvantaged class: not only did these children have to suffer from their father's failure to support them *prior* to his death, but the Act would now perpetrate this harm by denying benefits *after* his death.

Although the district court ignored it and the Secretary appears to have rejected it, a second purported purpose to justify the special support or residency requirement might be resurrected in this appeal. As is often asserted in public benefits litigation, the requirement might serve as a safeguard against fraudulent claims of paternity. If the fathers of illegitimate children lived with or supported them while alive, this is a safe indicator that paternity actually existed.

Any such purported purpose, however, could only be a lawyer's after-the-fact rationalization. Nowhere in the program's legislative history is such an intent evidenced. The structure of the Act and the Secretary's administration of the program both indicate that the support or residency requirement was viewed as a precondition relating to economic dependency, not a means of bolstering proof of paternity. The Secretary has concurred in this view in the district court below. Any "spurious claim" avoidance purpose, therefore, would appear to be farfetched and not envisioned by Congress.

Nevertheless, as with the "prior actual support" purpose, if it had been actually intended, it has not validly been pursued. The Secretary has shown that many informal means exist by which paternity can be proved by an illegitimate child. There is no valid reason to limit such proof to one form—support or residency—when to do so would bar many children who the program was intended to benefit. As the Secretary's administrative manual has indicated, various efficient and fool-proof mechanisms now exist to guard against spurious claims of paternity. The sufficiency of these means, and the arbitrary over breadth of the support or residency requirement, combine to make this scheme unnecessary and arbitrary.

There being no legitimate governmental interest that is properly promoted by the support or residency requirement as it affects appellant and his class, its operation should be enjoined.

ARGUMENT

I.

THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. §1253

In order to establish this Court's jurisdiction to hear this appeal, appellant will first show that, under any of several bases, the district court possessed the power to grant the relief sought in this case. Appellant will then show that, because he and his class sought an injunction restraining the enforcement of an allegedly unconstitutional Act of Congress, a three-judge court was required to hear this case. *See* 28 U.S.C. § 2282. Finally, because this is an appeal from the denial of an injunction by a statutorily required three-judge district court, jurisdiction of the appeal lies in this Court. *See* 28 U.S.C. § 1253.

A. Subject-Matter Jurisdiction Vested In The District Court

Appellant's complaint raised four grounds upon which the district court could have properly exercised subject-matter jurisdiction: federal mandamus, 28 U.S.C. § 1361; Social Security Act review, 42 U.S.C. § 405(g); federal-question jurisdiction, 28 U.S.C. § 1331; and Administrative Procedure Act review, 5 U.S.C. §§ 701 *et seq.* (App. 4). The district court relied for subject-matter jurisdiction upon the first three of these sources (App. 23).

1. Jurisdiction And Full Remedial Power Exists Under 42 U.S.C. §405(g)

In *Weinberger v. Salfi*, ____ U.S. ____ (1975), the Court put its blessing in a case such as this upon the jurisdictional base for judicial review of social security Title II claims, 42 U.S.C. § 405(g). An analysis of *Salfi* indicates that this jurisdictional predicate is equally applicable to this case. Furthermore, there is nothing in section 405(g) to in any way restrict the court's normal power to issue full equitable relief. It therefore was empowered to grant the complete relief requested by appellant and his class.

Because the named plaintiff in this case, Gregory Norton, Jr., alleged in his complaint (App. 8) and, in fact, fully exhausted all Social Security administrative hurdles before bringing his timely action in the district court (App. 20), there can be no doubt that the district court had subject-matter jurisdiction over his individual claim under 42 U.S.C. § 405(g). As is shown below, the court was also empowered under section 405(g) to grant full class, injunctive and declaratory relief as well.

a. District Courts Can Fashion Full Equitable Relief in a Section 405(g) Case

In a long series of cases this Court has approved the use by lower federal courts of their inherent equitable powers to fashion full relief to parties in instances where the statute conferring subject-matter jurisdiction did not specifically provide for broader equitable relief. This case surely falls within that pattern.

In a very similar setting in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), this Court met the issue of whether judicial review under the Emergency Price Control Act of 1942 was limited to those types specifically enumerated in the statute, rather than to broader equitable relief. In reading the district court's power to encompass broader relief, the Court stated:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." . . . It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Id. at 398. *See also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

In a similar jurisdictional setting in *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364 (1939), the Court reiterated these same views:

> The jurisdiction to review orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.

305 U.S. at 373. *Accord United States v. Morgan*, 307 U.S. 183, 191 (1939).

The district court could also have exercised the specific power conferred by the All Writs statute, 28 U.S.C. § 1651, to grant auxiliary relief, such as by a declaration of rights and an injunction. Federal courts are empowered to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In order to frame a decree which "secures a just result" in this case, the district court must have the injunctive tool at its avail. As this Court emphasized in *Flemming v. Nestor*, 363 U.S. 603 (1960), an individual judgment for Gregory Norton

> would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of appell[ant's] benefits.

Id. at 607. Norton and his class rightfully seek more. They have requested relief that guarantees that payments also be made to those illegitimate children wrongfully denied child's insurance benefits in the past

or who presently have similar claims pending (App. 10-11). Injunctive relief is necessary to guarantee this result. And the potential power of contempt which only accompanies this relief could be necessary to assure compliance. *Compare Aberdeen & Rockfish R.R. v. S.C.R.A.P.*, ____ U.S. ____, ____ n.11 (1975). The district court's power to declare a portion of the Social Security Act unconstitutional would be an empty one if it lacked a remedy to stop enforcement of that part of the Act.

If an injunction is the only adequate and full relief available to plaintiffs in a federal court action, the court's inherent equity powers allow it to grant such relief in order to restrain an administrative agency. *See American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Degge v. Hitchcock*, 229 U.S. 162, 170 (1913). And even if the statute allowing for judicial review makes no mention of injunctive relief, this form of equitable relief can still be granted, if necessary, to protect the rights asserted. *See Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56, 59-60 (1939); *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942).

Furthermore, even language in a statute apparently precluding review–which is not present in sections 405(g) or (h)–could not easily bar full equitable relief. As the Court said in *Porter v. Warner Holding Co.*, *supra*:

> The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503. See also Hecht Co. v. Bowles, supra 321 U.S. 330.

328 U.S. at 398.

There is no reference in sections 405(g) or (h), much less a "clear legislative command," that the granting of traditional equitable powers is to be precluded. Section 405(g) provides in part:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary . . . .

This section in no way intimates that the power to affirm, modify, or reverse is the only power a district court would have. Furthermore, the power to reverse surely does not preclude the power to do so by injunction. If anything, it supports such power.

This indeed would be a reasonable result. If a properly convened district court confronts an unconstitutional portion of the Social Security Act, it should, if requested, declare it invalid and enjoin its usage. To do otherwise would either force others in the same situation to be denied benefits based on an invalid portion of the statute, or else invite a multiplicity of suits to deal with this issue each time it arose. Injunctive relief in this instance is not only permitted, it is in fact the most intelligent and efficient manner with which an unconstitutional Social Security Act provision could be handled.

b. Class Relief is Appropriate and Permitted Under Section 405(g)

The *Salfi* case has clearly implied that class relief is available to a court exercising section 405(g) jurisdiction. *Salfi* denied class relief not because anything in section 405(g) precludes this form of relief, but because the class was improperly formed in the specific setting of that case. ____ U.S. at ____. Because class relief is fully necessary in order to do full justice in this case, the district court, upon remand, should grant injunctive relief not just to Norton, but to his class as well.

There is a significant practical consequence in permitting class-wide relief in this case. The district court should act to guarantee that all others similarly situated will be made whole after the Act's past improper implementation. Class relief is required for those who have wrongly been denied benefits in the past and who should therefore now have their situation corrected by the Administration. The district court should order the Secretary to notify the entire class of its eligibility for benefits. Otherwise, the past improper implementation of the Act would not be remedied. Only in this way could the district court "do complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. at 398.

If one court could not act in a complete fashion to fully remedy this problem, each person's remedy would be to sue individually throughout the country. Not only would this create an unnecessary multiplicity of litigation, but it would also burden a host of illegitimate children with the need to (1) learn of their new found right and (2) secure counsel to enforce it.

Because of the frequent poverty and lack of education generally found among illegitimate children,[6] this is an impossible task. Consequently, class relief is a part and parcel of the necessary and appropriate full relief required in this case.

The three-judge court declared that this action met the prerequisites of Fed. R. Civ. P. 23(b)(2) and should therefore proceed as a class action consisting of

> all of those persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that they be living with or supported by their father on the date of his death.

(App. 35).[7] This definition should meet the Court's exhaustion requirements as outlined in *Salfi*.

In order to be "otherwise eligible" for child's insurance benefits, each class member must have applied for benefits and have received a decision by the Secretary that he met each conditiion of eligibility but for the extra proof requirement of 42 U.S.C. § 416(h)(3)(C)(ii). This decision of ineligibility would therefore be the jurisdictional precondition for judicial

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[6] The district court in a similar case recognized that "common observation teaches that illegitimacy and indigency are often handmaidens." *Griffin v. Richardson*, 346 F.Supp. 1226, 1232 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

[7] The court never formalized this holding in its final judgment (App. 59) and thereby ran afoul of Fed. R. Civ. P. 23(c)(3). *Compare Board of School Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 130 (1975). This technical oversight can easily be remedied on remand.

review set forth by section 405(g), *i.e.*, the "final decision of the Secretary made after a hearing . . . ."

Nevertheless, if the district court's class definition does not, for this Court's purposes, sufficiently articulate the exhaustion requirements that must have been met by the class, on remand the judgment could be worded to ensure that the class includes only those who have exhausted their administrative remedies.

c. Conclusion

From the foregoing it is clear that 42 U.S.C. § 405(g) not only provided the district court with subject-matter jurisdiction, but also empowered it to grant complete, class-wide, injunctive relief in this case.

2. Jurisdiction Alternatively Exists Under 28 U.S.C. §1361

Another clear basis for subject-matter jurisdiction in this case is provided by 28 U.S.C. § 1361, the Mandamus and Venue Act of 1962. Not only does this case fall directly within the mandamus guidelines that traditionally have been set by the federal courts, but there is nothing in 42 U.S.C. § 405(h), as interpreted by this Court in *Weinberger v. Salfi, supra,* to preclude this type of jurisdiction. If, for some reason, full relief could not be achieved under section 405(g), the district court could reach this result based upon mandamus jurisdiction.

a. The Traditional Prerequisites of Mandamus Jurisdiction Have Been Met in This Case

Prior to 1962, mandamus jurisdiction only existed for original actions brought in the federal courts for the District of Columbia.[8] This source of jurisdiction did not arise from Title 28 or another federal statute but from the laws of the State of Maryland which governed the area ceded to the District of Columbia in 1801.[9] Thus, prior to 1962, mandamus jurisdiction did not exist in the United States District Court for the District of Maryland.[10]

The Mandamus and Venue Act of 1962 broadened this jurisdictional base so that parties can now utilize it in actions against government officials in federal district courts outside the District of Columbia.[11] The Act provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to

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[8] *Compare M'Intire v. Wood,* 11 U.S. (7 Cranch) 504 (1813) *with Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838).

[9] *See Kendall v. United States ex rel. Stokes, supra,* 37 U.S. (12 Pet.) at 621; Byse, "Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harv. L. Rev. 1479, 1499-500 (1962).

[10] For a compilation of Supreme Court cases holding that district courts outside the District of Columbia were not empowered with independent mandamus jurisdiction, see *Marshall v. Crotty,* 185 F.2d 622, 627 (1st Cir. 1950).

[11] *See* S. Rep. No. 1992, 87th Cong., 2d Sess. (1962); 1962 U.S. Code Cong. & Adm'n News 2785; K.C. Davis, Administrative Law Treatise § 23.09 (1970 Supp.).

> compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The jurisdiction conferred by section 1361 was intended by Congress to be:

> limited to compelling a Governmental official or agency to perform a duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision.[12]

It also appears that Congress intended resort to mandamus to be a "nonstatutory" method of review available only when "a statute does not specifically provide for review of the actions of a Government official . . . ."[13]

Although this Court has apparently not yet had the occasion to do so,[14] the many circuits courts which have dealt with 28 U.S.C. § 1361 since 1962 have recognized it as a valid grant of independent subject-matter jurisdiction and have sanctioned its use in situations involving (1) a clearly defined and ministerial duty upon a federal governmental official, (2) a clear and certain right to relief for the plaintiff and (3) no other adequate remedy.[15]

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[12]S. Rep. No. 1992, *supra.*

[13]*Id.*

[14]*But cf. Christian v. New York State Dept. of Labor,* 414 U.S. 614, 617 n.3 (1974).

[15]Most, if not all, of the Circuits have reached these conclusions. *See, e.g., Prairie Band of Pottawatomie Tribe of Indians v. Udall,* 355 F.2d 364, 367 (10th Cir. 1966); *Carter v. Seamans,* 411 F.2d 767, 773 (5th Cir. 1969); *Burnett v. Tolson,* 474 F.2d 877, 880 (4th Cir. 1973); *United States v. Walker,* 409 F.2d 477, 481 (9th Cir. 1969). Some Circuits hold, however, that mandamus will also lie to correct an agency's abuse of discretion. *See, e.g., Nixon v. Secretary of Navy,* 422 F.2d 934, 939 (2d Cir. 1970); *Peoples v. United States Department of Agriculture,* 138 U.S. App. D.C. 291, 295, 427 F.2d 561, 565 (1970). This latter issue is not present in this case.

[16]Mandamus is an appropriate jurisdictional base where the duty sought to be enforced stems from the Constitution. *See, e.g., Martinez v. Richardson,* 472 F.2d 1121, 1126 n.12 (10th Cir. 1973); *Walker v. Blackwell,* 360 F.2d 66, 67 (5th Cir. 1966). If an Act of Congress is challenged as being unconstitutional, as in this case, mandamus jurisdiction cannot be avoided by a government official's claim that he was following his duty by acting pursuant to this source of authority. *See Richardson v. United States,* 465 F.2d 844, 850 (3d Cir. 1972) (en banc), *r'v'd on other grounds,* 418 U.S. 166 (1974); *Griffin v. Richardson,* 346 F.2d 1226, 1230 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

Appellant's case fits well within these jurisdictional confines. The duty and right alleged are purely ministerial and require no judgment exercises of discretion in their implementation.[16] Appellant's class of illegitimate children either must or must not shoulder extra burdens of proof in order to qualify for social security benefits. Once this Court resolves this issue, the Secretary's course will be clearly defined. Furthermore, if jurisdiction does not exist pursuant to 42 U.S.C. § 405(g), as is discussed in Part I.A.1, *supra,* in a manner to grant full class injunctive relief, no other remedy appears to exist for this class. Thus, this case meets the statutory prerequisites for mandamus jurisdiction.

b. Mandamus Jurisdiction is Not Precluded by 42 U.S.C. §405(h)

A. Section 405(h)'s sentence barring review under jurisdictional bases between sections 1331 and 1359 of Title 28 does not bar review of this case under section 1361 of Title 28

Section 205(h) of the Social Security Act, 42 U.S.C. § 405(h), provides in part:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of Title 28 to recover on any claim arising under this subchapter.

It is this provision upon which the Court focused in *Weinberger v. Salfi, supra.* This section, however, does not preclude review under 28 U.S.C. § 1361.

When section 405(h) was first enacted in 1939,[17] Section 41 of Title 28 of the United States Code consisted of several subject-matter jurisdiction grants to the federal courts.[18] It did not include, however, the common-law rooted mandamus jurisdiction existing in the District of Columbia. In 1948, these jurisdictional grants were recodified into their present numerical form.[19] What had been section 41 became Sections

[17]*See* Social Security Act Amendments of 1939, ch. 666, Title II, § 201, 53 Stat. 1362.

[18]*See* 28 U.S.C. § 41(1) *et seq.* (1940 ed).

[19]Section 41 of Title 28 was repealed by the Act of June 25, 1948, ch. 646, 63 Stat. 992, which took effect on September 1, 1948.

1331 to 1348, 1350 to 1357, 1359, 1397, 1399, 2361, 2401 and 2402 of Title 28 of the Code.

The reference in section 405(h) to those jurisdictional bases contained in former Section 41 of Title 28, therefore, did not refer to mandamus jurisdiction as it existed prior to recodification in 1948. It, of course, also did not refer to many other bases of subject-matter jurisdiction which are not found between sections 1331 and 1359 of Title 28. Therefore, prior to 1962, a mandamus-based case such as this surely could have been brought in the District of Columbia. Furthermore, no change has been made in section 405(h) after that time to in any way refer to the limited pre-1962 mandamus, or to its present form in 28 U.S.C. § 1361. Thus, section 1361 jurisdiction is in no way precluded by the words of the last sentence of section 405(h).

If a mandamus-based action could have been brought in the District of Columbia prior to 1962 and not have been barred by section 405(h), and if the Mandamus and Venue Act merely extended the type of pre-1962 mandamus existing in the District of Columbia to the rest of the nation, then section 405(h) should be no bar to mandamus today.

The clarity of the words used in the last sentence of section 405(h) leaves no room for resort to other forms of statutory construction. But even if such construction were utilized, there exists no supporting legislative history[20] or other method of interpretation to allow a court to broaden section 405(h) so that it refers to, and

[20]*See* H.R. Rep. No. 728, 76th Cong., 1st Sess. 19, 43-44; S. Rep. No. 734, 76th Cong., 1st Sess. 21, 52.

thereby precludes mandamus jurisdiction. For example, the sentence in section 405(h) might have specifically, precluded *all* other forms of review. *Compare* 38 U.S.C. § 211(a). It did not follow this route, however, instead only precluding certain enumerated forms of judicial review, not including mandamus jurisdiction. This form of statutory construction consequently bolsters appellant's jurisdictional claim.

Because section 405(h) fails to preclude suits against the Secretary based upon mandamus jurisdiction, be it the limited pre-1962 variety or its present broader form, it is no bar to the exercise of this form of jurisdiction by the district court in this case.

B. Section 405(h)'s sentence barring review of a "decision of the Secretary," does not preclude this challenge to the validity of a decision of Congress.

Although in *Salfi* the Court primarily focused upon the third sentence in section 405(h), it could plausibly be argued that the section's second sentence is another attempted bar to non-405(g) jurisdiction. It reads:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

Further inquiry clearly indicates, however, that this sentence could not have been intended to preclude other forms of review, such as a constitutional attack on the statute by mandamus jurisdiction.

In *Johnson v. Robison*, 415 U.S. 361 (1974), the Court interpreted another nonreview provision relating

to the Veterans' Administration, 38 U.S.C. § 211(a), which provides in relevant part:

> The decisions of the [Veterans'] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The Court interpreted this provision to only preclude review of "decisions of the Administrator." 415 U.S. at 367. Because the attack in *Robison* was against a decision made by Congress–*i.e.*, the validity of the statute–judicial review was not precluded by 38 U.S.C. § 211(a). *Id.* This same reasoning was reasserted by the Court in *Salfi*. *See* ____ U.S. at ____.

Section 405(h) should be given this same interpretation. At the very most, only review of a "decision of the Secretary" could be barred. It would therefore not bar other forms of review of decisions of Congress–as are confronted in this case.

A second vantage point reinforces the conclusion that this sentence was not intended to bar other jurisdictional bases. If such an intention were present, why did Congress enact the third sentence of section 405(h)? If the second sentence were intended to preclude all other forms of jurisdiction, there would have been no need to preclude the several specific jurisdictional provisions referred to by section 405(h)'s third sentence (28 U.S.C. 1331 *et seq.*). The second sentence must therefore be read in a manner which makes the third sentence meaningful. *Accord Weinberger v. Salfi*, ____ U.S. at ____, ____ n.6. It can

only have real meaning if its "except as herein provided" clause was an attempt (albeit an awkward one) to refer to the third sentence, but not to go beyond its specific preclusions.[21]

C. Conclusion

It can therefore be seen that appellant and his class have met the statutory prerequisites for the exercise of district court mandamus jurisdiction. Furthermore, this form of judicial review is not barred by 42 U.S.C. § § 405(g) or (h), which can in no way establish the necessary "clear and convincing" congressional intent in order to restrict this form of judicial access. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). The district court therefore alternatively had subject-matter jurisdiction over this case under 28 U.S.C. § 1361.

3. Jurisdiction Alternatively Exists Under The Administrative Procedure Act

Appellant also alleged jurisdiction under the Administrative Procedure Act, 5 U.S.C. § § 701 *et seq.* For the

[21]This latter reading–that the real import of the second sentence is measured and limited by the specific references of the third sentence–is reinforced when it is recognized that the second sentence could never stand alone. If it did, its extremely broad and ambiguous language would bar other forms of review of, for example, the Secretary's firing of a Social Security Administration employee on an allegedly racial basis. Thus, the second sentence has to be meant to be strictly curtailed by the third sentence.

same reasons set forth in dealing with mandamus jurisdiction, there is no reference in section 405(h) to this form of subject-matter jurisdiction being exercised to correct an invalid statute. Accordingly, assuming the A.P.A. provides an independent base of subject-matter jurisdiction, it is not precluded in this case.

The circuits are currently split on whether the A.P.A. empowers district courts with independent subject-matter jurisdiction.[22] The decisions of this Court can be read to affirm the existence of A.P.A. jurisdiction. *See, e.g., Rusk v. Cort*, 369 U.S. 367 (1962); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); K.C. Davis, Administrative Law Treatise § 23.02 (1970 Supp.). A reading of the statute makes this result exceedingly reasonable.

The A.P.A. provides that "a person ... adversely affected or aggrieved by agency action ... is entitled to judicial review thereof." 5 U.S.C. § 702. In acting upon such a request for review, the district court may entertain "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction ...." 5 U.S.C. § 703. The reviewing court is empowered to "hold unlawful and set aside agency action ... found to be ... contrary to constitutional right ...." 5 U.S.C. § 706(2)(B).

[22]*Compare Bradley v. Weinberger*, 483 F.2d 410, 413-14 (1st Cir. 1973); *Brennan v. Udall*, 379 F.2d 803, 805 (10th Cir. 1967); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1109-110 (D.C. Cir. 1974), *with Zimmerman v. United States*, 422 F.2d 326, 330 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); *Arizona State Dept. of Public Welfare v. H.E.W.*, 449 F.2d 456, 464 (9th Cir. 1971).

Although the legislative history behind this enactment fails to further elucidate Congress' intent,[23] the clarity of the statute makes resort to judicial construction unnecessary.[24] Because there exists no other statute precluding review under the A.P.A.,[25] this alternative source of subject-matter jurisdiction exists in this case.

4. Conclusion

For the foregoing reasons, subject-matter jurisdiction exists in this case. If the result were otherwise, the Secretary's allegedly unconstitutional actions would be insulated from judicial purview, a result posing serious due process difficulties. *See Johnson v. Robison*, 415

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[23]*See, e.g.*, Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'NonStatutory' Judicial Review of Federal Administrative Action." 81 Harv. L. Rev. 308, 326 (1967).

[24]A slight ambiguity exists in 5 U.S.C. § 703 which permits judicial review in a "court of competent jurisdiction." But rather than imply that the A.P.A. is not an independent source of subject-matter jurisdiction, this condition "can reasonably be read as a recognition of generally applicable venue requirements." *Pickus v. United States Bd. of Parole, supra*, 507 F.2d at 1110 n.5.

[25]The A.P.A. is inapplicable where other "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As has been noted in Part I.A.2.(b), *supra*, however, section 405(h) of Title 28 does not speak this broadly. It only bans specific forms of review which do not include A.P.A. jurisdiction. Because section 41 contains no reference to any A.P.A. provision, it surely does not bar A.P.A. review.

U.S. at 366-67; *Murray v. Vaughn*, 300 F.Supp. 688, 695 (D.R.I. 1969).

B. Because A Three-Judge Court Was Required To Hear This Case, Appellate Jurisdiction Lies In This Court

Appellant's complaint sought injunctive relief based upon due process and equal protection grounds preventing the Secretary from refusing to grant him and his class "child's insurance benefits merely because they are illegitimate and unable to establish that their father lived with or supported them" (App. 10). This request surely brought this case within the confines of 28 U.S.C. § 2282:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge there of unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Appellant and his class met these three-judge court requirements. First, their claim is in no way "insubstantial," as required, for example, by *Zemel v. Rusk*, 381 U.S. 1, 6 (1965). Second, their complaint sought equitable relief "to interdict the operation of a [federal] statutory scheme," *Flemming v. Nestor, supra*, 363 U.S. at 607, of nation-wide proportions. *See, e.g., Zemel v. Rusk*, 381 U.S. at 7 n.4. *Compare Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963). Finally,

this direct restraint was based upon allegations of unconstitutionality of a portion of an Act of Congress, *see, e.g., California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938), which was frontally challenged and not "merely drawn in question." *See International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 250 (1938).

Having met the preconditions for the convening of a three-judge district court, appellant's avenue of appeal was to this Court:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253. Appellant and his class were denied a permanent injunction. As shown above, theirs was a "civil action" required by an "Act of Congress," 28 U.S.C. § 2282, to be "heard and determined by a district court of three judges." Appellate jurisdiction therefore properly rests in this Court. *See Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *MTM, Inc. v. Baxley*, ____ U.S. ____ (1975).

II.

THE SOCIAL SECURITY ACT'S REQUIREMENT THAT APPELLANT'S CLASS OF ILLEGITIMATE CHILDREN PROVE THEY WERE SUPPORTED BY OR LIVED WITH THEIR FATHER, WHICH IS NOT REQUIRED TO BE PROVEN BY LEGITIMATE AND OTHER ILLEGITIMATE CHILDREN, SERVES NO VALID LEGISLATIVE PURPOSE AND IS VIOLATIVE OF FIFTH AMENDMENT DUE PROCESS

Appellant and his class show below that the extra "support or residency" proof requirement imposed on them by 42 U.S.C. § 416(h) (3) (C) (ii), but not imposed on other children applying for their natural father's child's insurance benefits, promotes no legitimate governmental purpose. It accordingly denies appellant and his class equal protection as is embodied in the Fifth Amendment to the United States Constitution.

A. Discriminatory Classifications Against Illegitimate Children Must Be Subjected To Strict Judicial Scrutiny

The invidious discrimination challenged in this action is primarily between legitimate children and illegitimate children. In order to establish eligibility for child's insurance benefits, legitimate children are not required to establish that they were supported by or resided with their father prior to his death, but appellant's class of illegitimate children is required to shoulder this extra

burden. Although the Act also discriminates between classes of illegitimate children by presuming actual dependency for some of them and not others, this does not distract from the legitimate/illegitimate dichotomy. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). *Cf. Frontiero v. Richardson*, 411 U.S. 677 (1973).

This case thus poses two levels of discrimination: legitimates versus illegitimates and some illegitimates versus other illegitimates. The classifying factor in the first is status of birth, while that in the second is not. The presence in this case of the first form of discrimination makes this a case for the application of the strict scrutiny standard.[26]

In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court reiterated that certain "suspect" classifications are granted its "most exacting scrutiny." *Id.* at 28. It listed the "traditional indicia of suspectness" of a class as one which has traditionally been "saddled with ... disabilities" and "subjected to ... a history of purposeful unequal treatment." *Id.* Persons falling within such a class are "relegated to such a position of political powerlessness as to command

[26]If, for example, a previously all-white school admitted Black students who were taking "academic" courses but would not admit those taking "vocational" courses, it would surely be practicing racial discrimination against a class of Black students. The fact that it also discriminated between two groups of Black students would not somehow make its discrimination against Black vocational students more constitutionally permissible. The strict scrutiny standard of equal protection would still apply to this form of discrimination.

extraordinary protection from the majoritarian political process." *Id.*

When the strict scrutiny test is applied, the governmental classification "is not entitled to the usual presumption of validity." *Id.* at 16. Instead, the Government must carry a "heavy burden of justification" that its classification has been "structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." *Id.* at 16-17.

Appellant submits that illegitimate children fall well within the Court's test as a "suspect class." Like race and national origin, illegitimacy is "an immutable characteristic determined solely by the accident of birth." *See Frontiero v. Richardson*, 411 U.S. at 686, citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 175. Accordingly, "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id.* at 175. Illegitimate children, like Blacks, aliens, and other minorities, have traditionally been saddled with disabilities[27] and subjected to "social opprobrium." *Id.* at 176. Because of their socially imposed stigmas of

[27]Many of the cases which involve some of these disabilities are listed by the court in *Lucas v. Secretary of HEW*, 390 F.Supp. 1310, 1317-19 nn.6 & 7.

inferiority[28] and usual life of indigency,[29] illegitimate children have surely been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Compare San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 28.

Although a majority of the Justices individually have indicated in some form their preference for the strictest standard of judicial inspection regarding discriminatory classifications against illegitimate children,[30] the Court

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[28]*See generally* Krause, Legitimacy: Law & Social Policy (1971).

The majority of illegitimate children born in the United States are nonwhite. In 1965, approximately 167,500 nonwhite illegitimate births and 123,700 white illegitimate births were estimated. *See* National Center for Health Statistics, Public Health Service, U.S. Dept. of H.E.W., "Trends in Illegitimacy-United States-1940-1965" at 8 (Washington, D.C. 1968). The nonwhite illegitimate birth rate is about eight times the white illegitimate birth rate. *Id.* at 4.

Illegitimate children generally begin life on an unhealthy footing. More often than legitimate children, they are born prematurely and are underweight at birth, *id.* at 17, and have received less prenatal care and have had more prenatal complications. *Id.* As a result, their risk of death at birth is up to 50% greater than for legitimate births. *See id.* at 21.

[29]"Common observation teaches that illegitimacy and indigency are often handmaidens." *Griffin v. Richardson*, 346 F.Supp. at 1232.

[30]*See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 60 (Stewart, J., concurring); *id.* at 108 (Douglas & Marshall, JJ., dissenting); *Frontiero v. Richardson*, 411 U.S. at 686 (plurality opinion). *Cf. Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

has not yet been forced to officially resolve this issue.[31]

It is nevertheless clear that a certain high-level standard has been accepted by the Court. First, the "traditional" equal protection test of *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), is not applicable in a case such as this where the challenged form of discrimination does not exist for the purpose of achieving a "necessary allocation of finite resources." *Jimenez v. Weinberger*, 417 U.S. at 634 (1974). Just as in *Jimenez*, the Secretary has made no "finite resources" argument in this case. Thus, it is at least clear that the challenged classification must be supported by more than just "some reasonable basis."

Second, *Weber v. Aetna Casualty & Surety Co., supra*, establishes that the proper test at least approaches the "strict scrutiny" standard. *Weber* acknowledged that the Court is empowered by equal protection requirements "to strike down discriminatory laws relating to the status of birth where ... the classification is justified by no legitimate state interest, compelling or otherwise." 406 U.S. at 176.

It is therefore not enough for the challenged classification to merely have "some reasonable basis" which may be supported by "any state of facts reasonably ... conceived to justify it," as in *Dandridge v. Williams*, 397 U.S. at 471. Nor can a disadvantageous

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[31]*See Jimenez v. Weinberger*, 417 U.S. at 631-32 (1974). *But cf. Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 176 n.14. This uncertainty has created considerable confusion among lower courts. *See, e.g., Griffin v. Richardson*, 346 F.Supp. 1226, 1232-34 (D. Md.), *aff'd* 409 U.S. 1069 (1972); *Severance v. Weinberger*, 362 F.Supp. 1348, 1352 n.14 (D.D.C. 1973); *Miller v. Laird*, 349 F.Supp. 1034, 1039-43 (D.D.C. 1972).

classification of illegitimate children survive judicial scrutiny if it "is not made with mathematical nicety, or because in practice it results in some inequality," as was permitted in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Instead, clearly articulated legislative objectives must be present and the Court will not reach out for and speculate as to permissible legislative interests that might conceivably be promoted by the classification. *Cf. Jimenez v. Weinberger*, 417 U.S. at 633. Furthermore, the Court will not tolerate in this area of heightened scrutiny generalized prophylactic rules which avoid the need for individualized determinations. *Compare Weinberger v. Salfi*, ____ U.S. ____ (1975), *with Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) *and Reed v. Reed*, 404 U.S. 71, 76 (1971). Finally, the Court will demand accurate factual support for legislative presumptions, and will not easily accept vague rationalizations. *See United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). *Weinberger v. Wiesenfeld*, ____ U.S. ____, ____ n.16 (1975).

Because of the special degree of judiciary scrutiny which this classification requires, appellant and his class of illegitimate children assert, as has been explained in *Rodriguez, supra*, that the burden of justification for the extra condition of eligibility placed upon them rests with the Secretary. 411 U.S. at 16-17. *See also Frontiero v. Richardson*, 411 U.S. at 689. Furthermore, to pass constitutional muster, this classification must be precisely drawn and "structured with 'precision' " by use of the "least drastic means" available to serve its purposes. 411 U.S. at 16-17. Regardless of whether a

"strict" or "middle level" standard of review is employed, this Court's review must be penetrating, and the Secretary's excuse for perpetrating this discrimination must be thoroughly convincing.[32]

B. The Replacement Of Actually Received Support Is Not A Purpose Of The Child's Insurance Program, Nor Is The Act Suitably Tailored To Achieve This End

The Secretary and the majority of the court below have taken the position that the purpose of the "support or residency" requirement of 42 U.S.C. § 416(h) (3) (C) (ii) was to insure that child's insurance benefits were used to replace actual support lost by a child when his or her father died (App. 46 & 75). These benefits would accordingly not be intended to provide posthumous support to those who did not receive significant support from their father prior to his death. In the district court's words, the child's insurance benefit program was never intended to cover Gregory Norton or the class he represents" (App. 50). After accepting this notion, the court upheld the Act's "support or residency" requirement as a legitimate tool to further this purpose.

Appellant and his class agree that the entire Social Security system is structured so that its benefits are

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[32]The district court did not take this route. Although claiming otherwise (App. 39), it frequently lapsed into measuring the validity of 42 U.S.C. § 416(h)(3)(C)(ii) by the *Dandridge* standard (App. 45-46, 48-49, 50).

paid to covered wage earners and their dependents. When a wage earner retires, becomes disabled, or dies, social security O.A.S.D.I. benefits will attempt to provide economic security to the wage earner, if living, and to those who would look to him or her for their economic support.

The Secretary and majority of the district court, however, have taken a much too narrow reading of which "dependents" are to be protected by the Act. As is shown below, Congress actually intended child's insurance benefits to be received not just by those who were in fact supported prior to their father's death, but also those who were owed an obligation of support which was never fulfilled. This being Congress' overall purpose, the "support or residency" requirement deviates from this goal insofar as it affects illegitimate children. Furthermore, even if such a purpose were assumed to exist, it has not been achieved in a legitimate fashion. Such a purpose cannot therefore sustain the validity of the support or residency requirement of 42 U.S.C. § 416(h) (3) (C) (ii).

1. The Evolution Of The "Support Or Residency" Requirement

In 1939 Congress amended the Social Security Act to establish a national program of survivors' benefits. It replaced the previous protection given a wage earner's survivors – a lump sum payment upon death to his estate[33] – because these payments were "small and

[33]*See* Social Security Act of 1935, Title II, § 203(a), 49 Stat. 622.

inadequate . . . and entirely unrelated to the needs of the recipients . . . ." H. R. Rep. No. 728, 76th Cong., 1st Sess. 11 (1939). The amendments were enacted to "substitute monthly benefits for those groups of survivors whose probable need is greatest. These groups are widows over 65, widows with children, orphans, and dependent parents over 65." *Id.* The amendments were therefore structured to protect dependents of the deceased wage earner: those who had been in a position to look to the deceased for support.[34]

The portions of the survivors' program that specifically pertained to orphans were similarly patterned upon presumed dependency. Because it was assumed that "a child is normally dependent upon his father or adopting father . . . ,"[35] the amendments deemed such a child to be dependent.[36] The amendments dealt differently with other categories of children who presumably could look elsewhere (to another supporting father) for their

[34]As Dr. Arthur J. Altmeyer, the Chairman of the Social Security Board, explained to the House Ways and Means Committee:

> When we suggest substituting widows' and orphans' benefits for the present lump sum, we do so because experience has shown that widows and orphans of men who died prematurely are, in a great proportion of the cases, in need. . . . the whole pattern of benefits under this insurance system . . . [is geared] on the whole to the needs of the potential recipients of those benefits.

Hearings Relative to the Social Security Act Amendments of 1939, 76th Cong., 1st Sess. 2263 (April 3, 1939).

[35]H.R. Rep. No. 728, 76th Cong., 1st Sess. 36 (1939).

[36]Section 202(c)(3) of the 1939 amendments, provided for this presumption. It has been carried forward to the present. *See* 42 U.S.C. § 402(d).

support. Pursuant to section 202(c) (3) of the 1939 Act, those children who (a) were not legitimate or adopted, (b) had been adopted by someone other than the deceased wage earner, or (c) were living with or supported by a stepfather (not the deceased wage earner) were required to show, in order to establish their dependency, that they were "living with or supported by" the wage earner at the time of his death. *See* H.R. Rep. No. 728, *supra,* at 36.

The purpose of the "support or residency" requirement was therefore logical and legitimate. Those who had a right of support resting in someone other than the deceased wage earner would be expected, absent proof otherwise of actual support from the deceased wage earner, to have been cared for by their adopting father or stepfather.[37] The amendment would not allow them a double recovery from both potential sources of support.

This plan, of course, had a major flaw. It lumped illegitimate children in with those who had a new father substitute and therefore an alternative source of support, a category into which they did not correctly

[37]Adoptive parents are responsible for the support of their adoptive children; an adoption usually extinguishes the natural parents' duty to support. *See* H. Clark, Domestic Relations § 18.9, p. 659.

Step-parents had no common-law duty to support step-children, unless they had voluntarily assumed this duty. *Id.* § 6.2, p. 188. Some State statutes impose support requirements on step-parents where the natural parents are dead or unable or unwilling to support their children. *Id. See generally Lewis v. Martin,* 397 U.S. 552 (1970).

fall. Similarly, it was incorrect to assume that, like adopted children and stepchildren, they no longer had a need to exercise their natural father's obligation to support them. Thus, in 1939, Congress began its pattern of discrimination against illegitimate children.

In addition to the discriminatory "support or residency" requirement, Congress in 1939 subjected illegitimate children to a second obstacle. There was only one method by which they could become eligible for their natural father's survivors' benefits. They must have had to have been eligible to inherent their father's property under their State's intestacy laws.[38] Failing at this, insurance benefits were denied them.

About twenty-five years later a more magnanimous Congress sought to correct this second flaw in the child's insurance program. In 1965, Congress amended the Act to its present form to give illegitimate children alternative means of establishing their eligibility for their father's survivors' benefits.[39] Illegitimate children

[38]*See* 53 Stat. 1378, § 209(m).

[39]The following legislative history sets forth the reasoning behind these amendments:

> The social security program is national in scope, covering the worker without regard to the State in which he resides, and the program is intended to pay benefits as a partial replacement of lost support to those relatives of the worker who normally look to him for support. The Council believes that in such a program whether a child gets benefits on the earnings record of a person who has been determined to be his father, and who has an obligation to support him should not depend on whether he can inherent the person's intestate property under the laws of the State in which the person happens to live.

Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement 67 (1965).

can now establish their eligibility by showing that their parents went through a flawed marriage ceremony, 42 U.S.C. § 416(h) (2) (B); that their father acknowledged their paternity in writing or the same was done by a court order, 42 U.S.C. § 416(h) (3) (C) (i); or that other satisfactory evidence exists of their father's paternity, 42 U.S.C. § 416(h) (3) (C) (ii).

Unfortunately for appellant's class, however, Congress failed to fully eliminate the "support or residency" inequity. It did extend the presumption of dependency to the illegitimate children establishing paternity under 42 U.S.C. § § 416(h) (2) (B) and (h) (3) (C) (i). *See* 42 U.S.C. § 402(d) (3). It failed in this respect, however, regarding appellant's class. Thus, today appellant's class of illegitimate children are still lumped together with children adopted by someone else and those who have become supported stepchildren, *compare* 42 U.S.C. § 402(d) (3) (A) *with* 42 U.S.C. § 402(d) (3) (B) & (4), and accordingly still have to establish that they lived with or were supported by their father. *See* 42 U.S.C. § 416(h) (3) (C) (ii).

2. Congress Intended Child's Insurance Benefits To Replace The Loss Of The Right To Receive Support, Not Merely Actual Support

a. Congressional History Indicates that Child's Insurance Benefits Were Not Intended Merely to Replace Lost Support

The district court's conclusion that the Act merely intended to replace lost support was based upon its reading of part of the relevant legislative history. In

amending the Social Security Act in 1965 to establish the disputed child's insurance provisions, the Senate Report described the Act as a "national program that is intended to pay benefits to replace the support lost by a child when his father . . . dies . . . ."[40] This sentence could, of course, also be read so as to include those children who lost the "right" to receive support from their deceased father, even though he never honored this right.

The correctness of this latter reading is indicated by the legislatively more crucial House-Senate Conference Committee Report which stated that child's insurance benefits were intended to be granted "if the father was supporting the child or had a legal obligation to do so."[41] This purpose was reiterated by the 1965 Report of the Advisory Council on Social Security which also referred to "an obligation to support," rather than to the need to have actually received support.[42]

The explicitness of these latter two indicators of legislative intent should dispel the notion that the child's insurance benefits program was not intended for

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[40]S. Rep. No. 404, 89th Cong., 1st Sess. 110; 1965 U.S. Code Cong. & Adm'n News 2050.

[41]House-Senate Conference Comm. Rep. on 1965 Amendment to Social Security Act, 111 Cong. Rec. 18387 (July 27, 1965). *Accord* Committee Print "Summary of Major Provisions of Public Law 89-97, The Social Security Act Amendments of 1965" Committee on Ways and Means, 89th Cong., 1st Sess. 14 (Sept. 1965).

[42]Report of the Advisory Council on Social Security, "The Status of the Social Security Program and Recommendations for Its Improvement" 67 (Washington, D.C., 1965).

those, like Gregory Norton and his class, who were entitled to support from their father,[43] but who unluckily never received it. At the very least, the clear and chronologically later words of the Conference Committee should outweigh those of the earlier Senate Report. Accordingly, the district court fatally misread congressional intent.

b. The Act Is Structured So That Child's Insurance Benefits Do Not Merely Replace Lost Support

If the Act actually intended to require that its benefits would only go to those children who had actually been supported prior to their father's death, it is in no way structured to meet this goal. Other than in 42 U.S.C. § 416(h) (3) (C) (ii), which applies to Gregory Norton's class, the Act contains no pre-condition requiring proof of actual support in order to qualify for child's insurance benefits. To be eligible for these benefits, legitimate children need not have actually received support from their fathers prior to his death. Similarly, illegitimate children whose parents went through an abortive marriage ceremony, who can take under their state's intestacy law, or who possess a court support order, paternity order, or written

[43] As is generally the case on a nation-wide basis, *See* H. Clark, Domestic Relations, § 5.3, p.162 & n.4; § 6.2, p.187 (1968 ed.); *Gomez v. Perez*, 409 U.S. 535 (1973), Maryland too requires fathers to support their children, be they legitimate or illegitimate. *See* Md. Code Ann. Art. 27, § 88(b); Art. 16, § 66A & H; *Fiege v. Boehm*, 210 Md. 352, 359, 123 A.2d 316, 320-21 (1956).

acknowledgement of paternity need not have actually received support prior to their father's death in order to be eligible for child's insurance benefits. If this were a real purpose of the Act, why did Congress only seek to fulfill it with respect to one class of illegitimate children?

The district court sought to avoid this latter question by speculating that Congress intended benefits for those "more likely" to have been actually supported prior to their father's death (App. 48-49). Therefore, Congress apparently concluded that the fathers of legitimate children and the several other subclasses of illegitimate children "more likely" supported their offspring, while this same result did not obtain for Norton's class. To reach this conclusion, however, the district court relied on no indication of Congressional intent. Indeed, it even failed to establish that its speculation as to who was or was not more likely to have been supported bore any relationship to reality.

A 1970 welfare study, one of the few available for these purposes, showed that absent *married* fathers failed to support their legitimate children 81.7 percent of the time, while absent *unmarried* fathers of illegitimate children similarly failed to provide actual support 89.8 percent of the time.[44] This, of course, strongly contradicts the notion that all married fathers

[44] *See* Kaplan, Support from Absent Fathers of Children Receiving Aid to Dependent Children, 1955 U.S. Dept. of H.E.W., Social Security Adm'n, Bureau of Public Assistance at 17, 24, 35 & 39 (Washington 1960) *quoted in Watts v. Veneman*, 334 F.Supp. 482, 487 n.6 (D.D.C. 1971), *aff'd in part, r'v'd in part*, 476 F.2d 529 (D.C. Cir. 1973).

"more likely" support their legitimate children. A mere eight percent differential between the support rates of absent fathers of legitimate and illegitimate children could hardly form the basis of a generalization as broad as that reputed to Congress in this instance.[45]

The same lack of factual support exists for this presumption with respect to illegitimte children who are excluded from having to prove actual support because they qualified for benefits under 42 U.S.C. § 416(h) (3) (C) (i) (III) by possessing court support orders against their father. In 1971, for example, less than 25 percent of the parents and spouses who were under a court support order in Baltimore City were actually making support payments.[46] It was estimated at that time that there were more than $10 million outstanding in uncollected support payments. After a computer study in 1973, this figure was adjusted upwards to $65 million; it represented the amount owing in Baltimore City from about 39,000 fathers to their wives and children.[47] Because it appears that Baltimore fathers are in no way different than those elsewhere with respect to their diligence in obeying court-support orders,[48] the

[45] *Accord Beaty v. Weinberger*, 478 F.2d 300, 306 n.9 (5th Cir. 1973), *aff'd* 418 U.S. 901 (1974).

[46] *See* "City Seeking Aid to Enforce Support-Payment Collection," The Sun, p. C5 (Jan. 11, 1971) (App. 63).

[47] *See* "Computer Puts Non Support At $65 Million in City," The Evening Sun, p. C1 (March 27, 1973) (App. 65).

[48] A 1974 General Accounting Office study "limited to fathers who had agreed to make child-support payments, either under a court order or voluntarily . . . found widespread lack of compliance." "Welfare Abuses by Fathers Cited," New York Times (Dec. 7, 1974). "Only one-quarter of the fathers who had agreed to make support payments were regularly paying at least 90 percent of what they were supposed to pay." *Id.* Furthermore, "the over-all noncompliance record of fathers of children on welfare was not significantly different from what has been found in other studies of child-support payments that were not limited to welfare recipients." *Id.*

district court's presumption[49] regarding compliance should in fact be the opposite. Fathers of children with a court support order are "more likely" to have *not* supported their children.

The likelihood for the other excused subcategories of child applicants to have actually been supported is surely as uncertain as the two just examined. Only unfounded speculation could conclude that children whose fathers have acknowledged them in writing or who could receive property under a state intestacy statute are more likely to have received support prior to their fathers' deaths.[50] Such inexact speculation should have no place in a case dealing with discrimination against illegitimate children. *Cf. Jimenez v. Weinberger*, 417 U.S. at 633. Furthermore, when illegitimacy is involved, a "more likely" standard is far too lax. Under the strict scrutiny test or even the *Weber* test, it is highly doubtful that even "almost all" would be enough.

[49] The district court stated: "When an order of support is entered by a court, it is reasonable to assume compliance occurred." (App. 48).

[50] In Maryland, for example, the intestate succession law, which took effect in January 1970, Md. Code Ann. Art. 93, § § 1-205 & -208 (1970), allows an illegitimate child to receive his deceased father's property if, *inter alia*, he "openly and notoriously recognized the person to be his child . . . ." If Gregory Norton's father had died after 1970, Gregory surely could have met this test. By doing so, however, nothing is really proven regarding whether his father was likely to have actually supported him.

c. Jimenez Rejected a Reading of the Act Limiting its Benefits to Those Who Received Prior Support

This Court's opinion in *Jimenez v. Weinberger, supra*, clearly rejected any congressional purpose to require a child beneficiary to have been actually supported *prior* to the onset date of the age, disability or death giving rise to eligibility.[51] 417 U.S. at 634. If no actual support requirement existed prior to disability or death, it is difficult to imagine where such a purpose would come from requiring any other form of actual support.[52]

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[51] *Jimenez* stated that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." 417 U.S. at 634. The district court read this reference to "dependents" to include only those who were dependent and actually received support, not those who were dependent but whose fathers failed in their duty of support (App. 75). Another district court, however, has reached the conclusion that *Jimenez* fully rejected any actual support requirement. *See Adams v. Weinberger*, C.C.H., Unemployment Ins. Rptr. ¶14,001, p. 1906. The *Adams* impression is easily obtained. *Jimenez* stated:

> The Secretary maintains that the Act denies benefits to afterborn illegitimates . . . because it is "likely" that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner . . . . Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability . . . . We do not read the statute as supporting that view of its purpose.

417 U.S. at 634.

[52] Significantly, *Jimenez* relied upon the same indicators of congressional intent as do appellants. *See* 417 U.S. at 634 n.3. These legislative sources refer not only to actual support provided, but also the "obligation" to provide support.

d. In Another Forum The Secretary Has Admitted that the Act Was Intended to Extend to Those With a "Right to Support"

In *Lucas v. Secretary of H.E.W.*, 390 F.Supp. 1310 (D.R.I. 1975), a case raising the same issue on the merits as this case, the Secretary admitted to the district court that Congress did not intend the child's insurance program to merely replace support actually lost, but rather to grant benefits to those enjoying "the right to support." *Id.* at 1320. The Secretary cannot, of course, have it both ways. His statement in *Lucas*, perhaps made in reaction to *Jimenez*, severely undermines any present attempt he might make in this Court to assert the contrary.

e. The Harsh Impact of the District Court's Notion of Congressional Purpose Makes it Unlikely that Congress Intended Such a Result

In order to ascribe to Congress an intent to aid only those children whose fathers actually gave them financial support, a court would have to imagine that Congress would intend to deny benefits to those who are most in need of them. If, for reasons beyond the control of an illegitimate child in appellant's class, his or her father refused to support him or her during his life, that child has even greater needs for child's insurance benefits. Because "illegitimacy and indigency are often handmaidens,"[53] Congress would have had to

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[53] *Griffin v. Richardson*, 346 F.Supp. 1226, 1232 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

intend a double injury for such a child: no adequate support prior to the father's death and no death insurance benefits after it. Because the Social Security Act is intended to work in a humanitarian manner,[54] it should strain a court's credibility to lay such an intent at Congress' door.

3. Even If Congress Did Intend Child's Insurance Benefits To Only Replace Actually Received Prior Support, It Achieved This Result In An Arbitrary and Invalid Manner

If it could be said that the child's insurance program was intended only to give financial assistance to those children who previously were supported by their fathers, the "support or residency" requirement of 42 U.S.C. § 416(h) (3) (C) (ii) would still be invalid because it would achieve this purpose in an arbitrary and capricious manner. Most of this arbitrariness has been outlined above.

First, if such indeed were the program's purpose, there is no good reason why it only singles out appellant's class as having to establish this condition. Just as in *Jimenez*, it excuses many other children from having to meet this condition who could not in fact do so. The promotion of such a purpose would therefore

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[54]The congressional policy underlying the federal social security legislation requires courts to interpret the Act liberally, and any doubts should be resolved in favor of coverage.

Herbst v. Finch, 473 F.2d 771, 775 (2d Cir. 1972), quoting *Rasmussen v. Gardner*, 374 F.2d 589, 594 (10th Cir. 1967).

be done in an arbitrary "over inclusive" manner. 417 U.S. at 637. It is arbitrary to deny benefits to one class of illegitimate children because their fathers failed to support them, while giving all other classes of legitimate and illegitimate children benefits regardless of their fathers' support.

Second, even if there were some logic to assuming support for all groups except appellant's, it is unfair to single out a group and punish it for nothing which it could control. Appellant's class of illegitimate children are obviously not at fault for their fathers' misdoings. It is bad enough that they were not supported during their fathers' lives. It absurdly compounds this tragedy to again deny much needed support after their fathers' death.

Third, even when seen from the nonsupporting father's perspective, the support and residency requirement is arbitrary. Each class member's father was a covered wage earner under the Social Security Act. He paid into the Social Security Trust Fund in order to support himself and his dependents upon his old age, death, or disability. Under the Secretary's reading of 42 U.S.C. § 416(h) (3) (C) (ii), his child's insurance benefits will now be paid to no one.

The discrimination in this case is very similar to that encountered by the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which a servicewoman could not receive fringe benefits for her husband unless she proved that he was actually dependent upon her for over one-half of his support. On the other hand, it was presumed that the wives of servicemen were dependent on their husbands. This classification was also justified on the grounds of estimates of who was more likely to

be a dependent. The support of residency requirement of 42 U.S.C. § 416(h) (3) (C) (ii) works the same disadvantage upon appellant's class of illegitimate children as did the similar classification in *Frontiero*. The constitutional result should therefore be the same.

If "actual support" were a purpose of the child's insurance benefit program, it is structured not to fairly achieve this purpose. There is no fair precision or accurate tailoring in an Act which presumes illegitimate children with a court support order will in fact be supported when real life statistics show otherwise. Not only has the Secretary failed to factually support Congress' supposed presumptions, but most of them can be shown to be totally incorrect. Such an unsupported conglomeration of false assumptions cannot add up to a valid formula to deny appellant's class child's insurance benefits. Section 416(h) (3) (C) (ii)'s gross inaccuracies could not pass judicial scrutiny even if it were not a suspect class that is being discriminated against. The fact that this disability bears absolutely no "relationship to individual responsibility or wrongdoing" should make its arbitrariness and consequent invalidity even more certain.

C. Section 416(h) (3) (C) (ii) Does Not Serve, Nor Was Intended To Serve Any Legitimate Purpose In Guarding Against Fraudulent Claims Of Paternity

As has been shown in the preceding sections, the "support or residency" requirements in the Act were developed by Congress as a means of establishing dependency for those persons who were not entitled to

support by the deceased wage earner and who normally would look to other sources of support but who (such as a parent or stepchild) nevertheless may actually have been dependent. The clear congressional purpose of this condition of eligibility for survivors' benefits was therefore to provide a means to establish dependency for those not otherwise entitled to support.

There is nevertheless a second potential purpose which the "support or residency" requirement of 42 U.S.C. § 416(h) (3) (C) (ii) might arguably have been intended by Congress to serve. This is the easily asserted catchall that this extra condition of eligibility was intended to guard against fraudulent claims for child's insurance benefits. The clarity of the Act's concern for establishing dependency with this requirement, however, dispels the possibility of any other intended purpose.

At earlier stages in this litigation the Secretary attempted to justify the "support or residency" requirement as a necessary means to prevent spurious claims. Later, however, the Secretary did, correctly we believe, abandon this purported purpose and the district court failed to even dignify it by mentioning it. Consequently, it is doubtful that any argument could persist in this case that this was actually a bonafide congressional goal which the subsection was intended to promote. Nevertheless, because of the facility with which this purpose can almost always be raised,[55]

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[55]Prevention of spurious claims has often been asserted as a statute's "rational basis" in similar cases before this Court. *See, e.g., Jimenez v. Weinberger*, 417 U.S. at 633-34; *United States Dept. of Agriculture v. Moreno*, 413 U.S. at 535; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 174.

appellant anticipates it being raised again in this setting and deals with it below.

As best stated, Congress could be seen as requiring that Norton and his class establish firmer proof of their fathers' paternity. Thus, if an illegitimate claimant were not to establish his or her father's paternity by any of the specifically approved methods (court order, written acknowledgement, etc.) but had to resort to unspecified methods, at least the inferences to be drawn from a finding of support or residency would help weed out fraudulently conceived claims. Although the erection of safeguards regarding the proof of an illegitimate child's paternity are admittedly legitimate congressional enactments,[56] 42 U.S.C. § 416(h) (3) (C) (ii) does not really pursue this goal.

1. The Words Of The Act Preclude The "Spurious Claim" Purpose

The best place from which to discern the intended purpose of a statute lies in its own words. Section 416(h) (3) (C) (ii) allow child's insurance benefits when

> such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

As can be seen, the first clause (before the comma) requires proof of paternity; the second clause (after the

[56] *See, e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 174; *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

comma) requires proof of support or residence. The two elements are styled so as to be independent of one another. The support or residency requirement is not necessarily just another way to prove paternity. It is a condition that must be met *in addition to* proving paternity. In the district court's words, the Act requires that "the dual elements of paternity and dependency" be proven by this class of illegitimate children (App. 47-48). Thus, as in Gregory Norton's case, even if paternity is satisfactorily proven to the Secretary, residence or support must also be proven in order to establish eligibility.

The Social Security Administration has itself made this point in an even clearer fashion. In its Social Security Claims Manual, which instructs all local Administration employees on how to administer the benefits program, it is clearly pointed out that paternity and support or residence are two distinct and unrelated preconditions of eligibility:

> In addition to establishing paternity based on "other evidence" [under 42 U.S.C. § 416(h) (3) (C) (ii)] it is also necessary to establish that the child was either living with or being supported by [the wage earner] at the pertinent time.[57]

The Secretary's Claims Manual interpretation of the Act's requirements is also such as to show that paternity could be proven by any "satisfactory evidence" and that the "support or residency" requirement is not a mandatory form of proof which is required to bolster proof of paternity:

[57] Social Security Claims Manual § 2428.5 (Development of Other Evidence), *See also id.* at § 2425(b).

> The evidence must identify the child in question and must establish that the WE [wage earner] is the biological father of the child. There is no requirement that the evidence be in any specific form. Satisfactory evidence may include a court decree, court order, or written acknowledgment which establishes paternity but which was made too late to qualify the child under [42 U.S.C. § 416(h) (3) (C) (i)]. Statements by the WE's relatives that the WE considered the child his own may also constitute evidence.[58]

Because, by the words of the statute and the Secretary's interpretation, paternity must already have been proven before the second requirement – support or residence – is taken up, this latter requirement can surely not be viewed as existing to insure an accurate paternity finding. Although on occasion it might coincidentally do so, its purpose is clearly to establish an additional requirement of eligibility, not just to reinforce the first one.

2. The Secretary Has Now Abandoned The "Spurious Claim" Purpose

At the inception of this litigation, the Secretary asserted that a purpose of section 416(h) (3) (C) (ii)'s support or residency requirement was to guard against spurious claims of paternity made by fraudulently motivated applicants.[59]

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[58] *Id.* at § 2427.5 (Other Satisfactory Evidence Defined).

[59] *See* Memorandum in Support of Defendant's Motion to Dismiss, etc., at 16 (filed June 21, 1972); Defendant's Reply Brief at 8 (filed August 22, 1972).

That view of Congress' potential reasoning with respect to 42 U.S.C. § 416(h) (3) (C) (ii) has now apparently been abandoned by the Secretary. He did not reassert it as a potential "rational basis" in the last three memoranda he filed with the district court.[60] Indeed, he appears to have now specifically rejected this reading of congressional purpose. He has described the "support or residency" requirement to provide that

> in addition to a showing of paternity, these claimants must show factors which would tend to establish their economic dependency upon the deceased wage earner.[61]

The district court also embraced this same view. In explaining the "whole thrust" of section 416(h) (3) (C) (ii), it stated:

> the provision requires some proof sufficient to the Secretary of actual paternity. It then requires proof that the illegitimate child whose paternity is proven establish either that he or she actually was supported by ... or ... lived with the wage earner .... (App. 48).

Therefore the Secretary and the district court agreed that the "support or residency" condition was not

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[60] *See* Supplemental Memorandum in Support of Defendant's Motion to Dismiss, or in the Alternative, Summary Judgment, pp. 3-6 (filed March 21, 1973); Defendant's Memorandum on Remand, pp. 6-9 (filed Aug. 16, 1974); Defendant's Reply to Plaintiff's Memorandum on Remand from the United States Supreme Court, pp. 6 & 7 (filed Aug. 30, 1974).

[61] Supplemental Memorandum in Support of Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, *supra*, at 6.

established by Congress as a means to guard against spurious paternity claims, but rather to establish prior economic support.

3. No Observable Congressional Intent Supports The "Spurious Claim" Purpose

When dealing with discriminatory classifications adversely affecting illegitimate children, courts should not, with the comfortable advantage of hindsight, engage in speculation as to what Congress might have intended. *Cf. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 632 (Powell, J., concurring). Instead, the declaration of congressional intent must be direct and obvious. To be certain that Congress meant it, it must have been legislatively "articulated." *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 17.

Nowhere in the legislative history of the original child's insurance benefits legislation[62] or its later amendment regarding the granting of these benefits for illegitimate children[63] is there the slightest indication

[62] *See* Report of the Social Security Board, Proposed Changes in the Social Security Act, H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939); S. Rep. No. 734, 76th Cong. 1st Sess. (1939); Hearings Relative to the Social Security Act Amendments of 1939 Before House Comm. on Ways and Means and Before Senate Finance Comm., 76th Cong., 1st Sess. (1939).

[63] *See* Report of the Advisory Council on Social Security, "The Status of the Social Security Program and Recommendations for Its Improvement" (1965); S. Rep. No. 404, 89th Cong., 1st Sess. (1965); Conference Comm. Rep. on 1965 Amendment to Social Security Act, 111 Cong. Rec. 19387 (July 27, 1965).

that the support or residency requirement of 42 U.S.C. § 416(h) (3) (C) (ii) was intended to avert spurious claims of paternity.

A reading of the entire Act does show that Congress was aware of the need to prevent spurious claims. In certain parts of the Act which actually deal with fraud prevention, Congress has erected a full complement of safeguards. In the first instance, the claimant has the full burden of proof to establish his or her eligibility for benefits. An applicant under 42 U.S.C. § 416(h) (3) (C) (ii) must present proof of paternity which is "satisfactory to the Secretary." The Secretary thus retains the final say, subject to judicial review, of the existence of paternity. His findings of fact are final and binding, *see* 42 U.S.C. § 405(h), and are conclusive if supported by substantial evidence. *See* 42 U.S.C. § 405(g).

If a fraudulently induced payment should be made, administrative and criminal sanctions can be imposed. If an incorrect overpayment is made, the claimant's future benefits can be reduced in order to recoup the amount of the overpayment, or the beneficiary or his estate can be made to refund the excess amount. *See* 42 U.S.C. § 404(a) (1). The Act also makes it a misdemeanor, punishable by up to a $1000 find or one year imprisonment, or both, to fraudulently procure social security benefits. *See* 42 U.S.C. § 408. These provisions are what Congress actually and directly intended as protection against spurious claims.

Absent any clear indication that Congress actually entertained such a thought,[64] and considering the

[64] *Compare* the explicit congressional intent found, for example, in *Weinberger v. Salfi*, ____ U.S. at ____.

special nature of discrimination against illegitimate children, the Court should not engage in unfounded speculation in order to "find" such a congressional purpose.

4. If Prevention of Fraud Were A Purpose Of Section 416(h) (3) (C) (ii), It Has Not Been Validly Achieved

Appellant has just shown that Congress never actually viewed the "support or residency" requirement of section 416(h) (3) (C) (ii) to serve as a potential safeguard against the making of fraudulent claims for child's insurance benefits. If the Court is unconvinced by this position, however, appellant demonstrates below that any attempted pursuit of this goal has been achieved in an arbitrary manner which cannot survive the heightened level of judicial scrutiny applicable to this case.

The most basic flaw with this possible purpose is that it has been attempted in a far too stringent manner. As occurred in Gregory Norton's individual case where the Secretary clearly found paternity to exist (App. 18), this additional condition of eligibility will disqualify persons who are indeed their father's children and therefore intended beneficiaries under the Act. In this sense the extra proof requirement is overly broad. *Compare Jimenez v. Weinberger*, 417 U.S. at 637. And by excusing all other legitimate and illegitimate children from having to meet this requirement, the Act heaps this burden on the one class most desperate for child's insurance benefits – those whose fathers while living ignored them. Appellant submits that it is unfair to

force one class of claimants to establish their eligibility by showing that they lived with or were supported by their parents, when this element is not required for any other natural child.[65] As the Court noted in *Frontiero v. Richardson*, 411 U.S. at 689 n.22, special rules, such as this, which rely on prior economic discrimination often aid and abet the perpetuation of the same disadvantaged position.

Just because the support and residency requirement could be passed off as a safeguard against spurious claims of paternity is no guarantee as to its constitutional validity. The Court has clearly recognized the need for safeguards to ensure actual paternity. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 174. Although these "problems are not to be lightly brushed aside," they nevertheless cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. at 538. Thus, this Court has recognized that not all conditions of eligibility that serve such a purpose can survive equal protection scrutiny. *See Jimenez v. Weinberger, supra.*

It is surely true that those children who can show that their fathers lived with or supported them are more likely to be able to prove their fathers' paternity. Living with and supporting a child is surely an indicator of actual paternity. Nevertheless, many actual fathers, whose paternity is unquestioned, fail to live with or support their children. This is indeed another stigma which many illegitimate children have to endure.

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[65] As was shown in Part II.B.1(b), *supra*, many legitimate and illegitimate children are not in fact supported by their fathers.

The harshest aspect of such a mandatory form of proof is that it severely handicaps the poor and less literate, who unfortunately are highly represented in appellant's class. They come from families who are unfamiliar with the availability of paternity decrees and court support orders to enforce support obligations. Although these avenues may seem reasonable and accommodating to the middle class ethos, they are strange and unfamiliar to the poor. Furthermore, if a mother knows her child's father has no money, he already has enough trouble; why also turn the court bureaucracy against him? And even more logically, why spend endless hours waiting in court and in a prosecutor's office to effect an order with little apparent meaning to a poor family's life?[66]

Similarly, indigents do not neatly transcribe their thoughts for posterity in writing so as to later coincidentally serve as proof for social security benefits. If indigency is a handmaiden of illegitimacy,[67] then illiteracy surely is also. It is unnatural to expect fathers of illegitimate children to perform this act.

It can therefore be seen that the hardship of the "support and residency" requirement falls on those least able to afford it. The Act's available methods of proof, if informal methods are to be excluded, pose an impossible burden for the many children born out of wedlock whose fathers have abandoned them.

It, accordingly, is overreaching to require residence or support (in the absence of formalized proof) as a

[66]Even if a father has financial resources, chances are he will not comply with a court support order. *See* Part II.B.1(b), *supra*.

[67]*See Griffin v. Richardson*, 346 F.Supp. at 1232.

necessary guarantee of paternity. As the Administration's Claims Manual has recognized, paternity can be proven in many other ways. This was indeed done by Gregory Norton. The Veterans' Administration, has also acknowledged the need for broad forms of proof of paternity. In determining issues of paternity for its analogous program of children's benefits, it permits proof by the illegitimate child through, *inter alia:*

> Any other secondary evidence which reasonably supports a finding of relationship, as determined by an official authorized to approve such findings, such as:
>
> (i) A certified copy of the public record of birth or church record of baptism showing the veteran was the informant and was named as father of the child; or
>
> (ii) Statements of persons who know that the veteran accepted the child as his; or
>
> (iii) Information obtained from service department or public records, such as school or welfare agencies, which shows that within his knowledge the veteran was named as the father of the child.

38 C.F.R. § 3.210(b) (3). This wide range of methods of proof is reasonable. It encompasses the means of proof that lower income people can realistically meet. It permits illegitimate children to establish their entitlement with a realistic and relevant system of proofs. It does not punish illegitimate children whose parents are illiterate or unwise in the ways of the court-ordered support system.

Appellant and his class therefore submit that, if the Act is to be read so that the "support or residency" requirement is a mandatory mode by which they must prove paternity, this result will cause unjustified

hardship on the many illegitimate children whose fathers never actually supported them. By disqualifying these intended beneficiaries of the child's insurance benefits system who were entitled to their father's support while living, this classification is arbitrary and capricious. Because it invidiously discriminates against appellant and his class, it should be enjoined and declared invalid as violative of Fifth Amendment due process.

III.

CONCLUSION

For the reasons asserted in Part I above, appellant and his class submit that the district court was empowered to issue class-wide injunctive relief and that jurisdiction over this appeal properly lies in this Court. Because, as is shown in Part II above, no adequate justification exists for requiring appellant and his class in order to qualify for child's insurance benefits to prove, in addition to paternity, that they were living with or supported by their father prior to his death, this requirement invidiously discriminates against illegitimate children. The judgment of the district court should therefore be vacated and reversed and this case should be remanded for the entry of an appropriate declaratory and injunctive decree.

C. CHRISTOPHER BROWN
Legal Aid Bureau, Inc.
341 N. Calvert Street
Baltimore, Maryland 21202

Attorney for Appellant

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In the Supreme Court of the United States

OCTOBER TERM, 1975

GREGORY NORTON, JR., ETC., APPELLANT

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

KEITH A. JONES,
Deputy Solicitor General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the single-judge district court concerning the nonconstitutional aspect of this case is reported at 352 F. Supp. 596. The first opinion of the three-judge district court is reported at 364 F. Supp. 1117. This Court vacated the judgment of the three-judge court and remanded the case for reconsideration, 418 U.S. 902. The district court's opinion upon remand is reported at 390 F. Supp. 1084.

JURISDICTION

The judgment of the three-judge district court (A. 96) was entered on February 28, 1975. Notice of appeal (A. 97) was filed on March 17, 1975. The jurisdictional statement was filed on March 19, 1975. On June 30, 1975, the Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 99). While appellant has invoked this Court's jurisdiction under 28 U.S.C. 1253, we show below (*infra*, pp. 8-27), that this Court lacks jurisdiction over the appeal.

QUESTIONS PRESENTED

1. Whether the three-judge district court had jurisdiction to enjoin operation of certain provisions of the Social Security Act.

2. Whether Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act deny due process insofar as they condition certain illegitimate children's receipt of surviving child's insurance benefits upon a showing that a deceased wage-earner was their parent and was, at the time of his death, living with them or contributing to their support.

STATUTES INVOLVED

The pertinent statutory provisions of Title II of the Social Security Act, 49 Stat. 622, as added and amended, 42 U.S.C. 402, *et seq.*, are set forth in the appendix to this brief, *infra*, pp. 1a-8a.

STATEMENT

1. This is a direct appeal from a decision of a three-judge court sustaining the constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, as added and amended, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii),[1] which, in the case of certain illegitimate children, condition the payment of child's survivor benefits upon a showing, satisfactory to the Secretary, that the deceased wage-earner was the child's parent and that the wage-earner "was living with or contributing to the support of the [child] at the time [the wage-earner] died." At the outset, therefore, we describe the statutory scheme governing the payment of child's survivor benefits.

Surviving child's insurance benefits are payable to children under the age of 18 (or, in the case of full-time students, under the age of 22) who were dependent upon a deceased wage-earner at the time of his death. Section 202(d)(1)(B) and (d)(1)(C) of the Act. The Act presumes as a matter of law, however, that children who have not been adopted by another individual or individuals are dependent upon their parents. Section 202(d)(3) of the Act. Illegitimate children who have no adoptive parents are similarly presumed by the Act to be dependent (1) upon natural parents who went through a marriage ceremony that was rendered invalid by a non-

[1] See App., *infra*, pp. 2a, 7a-8a.

obvious legal impediment or (2) upon a natural parent who (a) had acknowledged in writing that the child was his son or daughter, (b) had been decreed by a court to be the child's father, or (c) had been ordered by a court to contribute to the support of the child because the child was his son or daughter. Section 216(h)(2)(B) and (h)(3)(C)(i) of the Act.

Other children must establish their dependency upon the deceased parental wage-earner in order to be entitled to child's survivor benefits. Thus a child (whether legitimate or illegitimate) who has been adopted by another individual or individuals, or an illegitimate child who does not fall within any of the categories to which the presumption of dependency applies, in order to receive child's survivor benefits on the basis of a deceased wage-earner's Social Security account, must establish both that the wage-earner was his parent and that the wage-earner was living with or contributing to his support at the time of death. Sections 202(d)(3) and 216(h)(3)(C). Similarly, a stepchild claiming under the Social Security account of his stepparent must establish that, at the time of death, he was living with or receiving at least one-half of his support from that stepparent. Section 202(d)(4).

2. The named appellant herein, Gregory Norton, Jr., is an illegitimate child who sought child's insurance benefits after the death of Gregory Norton, Sr., his putative father. Appellant did not fall within any of the categories of illegitimate children entitled

to the presumption of dependency: he was unable to furnish a written acknowledgment of paternity by, or any evidence of entry of a support order or paternity decree against, Gregory Norton, Sr. Accordingly, appellant sought to establish, under Section 216(h)(3)(C)(ii), that Gregory Norton, Sr., was his natural father and was living with or contributing to his support at the time of death. After an administrative hearing, the hearing examiner found that Gregory Norton, Sr., was appellant's father but that he had neither been living with appellant, nor contributing to his support, at the time of death (A. 13-19).

Appellant then instituted this action in the United States District Court for the District of Maryland, challenging the hearing examiner's finding that he had failed to prove his dependency upon his father. Alternatively, appellant, on behalf of himself and all other persons similarly situated, sought to enjoin the operation of Section 216(h)(3)(C)(ii) as invidiously discriminatory against illegitimate children in violation of the Fifth Amendment. A single-judge district court sustained the hearing examiner's finding that appellant had failed to meet his burden of proof under the challenged statute (A. 22-29). A three-judge court was then convened pursuant to 28 U.S.C. 2282 and 2284 to adjudicate appellant's constitutional claim. That court sustained the constitutionality of the statute (A. 31-54). Thereafter, this Court vacated the judgment of the three-judge court and re-

manded the case for reconsideration in light of *Jimenez* v. *Weinberger*, 417 U.S. 628. 418 U.S. 902. Upon reconsideration, the district court again sustained the challenged statute, with one judge dissenting (A. 70-95).[2]

SUMMARY OF ARGUMENT

Here, as in *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, the district court lacked jurisdiction over so much of the case as concerns the class, since there was no showing that the members of the class met the jurisdictional predicate of Section 205 (g). As in that case, there was here no allegation that the class members had even filed applications for benefits, and thus no indication that they sought review of any decision of the Secretary with regard to such applications. Moreover, as in *Salfi*, alternative jurisdictional bases for suit are precluded by Section 205(h). Although the district court had jurisdiction over the named plaintiff under Section 205 (g), that Section does not authorize the grant of an injunction against the enforcement of the Act. Accordingly, the convocation of a three-judge district court was not required pursuant to 28 U.S.C. 2282, and this Court lacks jurisdiction on direct appeal under 28 U.S.C. 1253. Since the three-judge court

[2] However, in *Lucas* v. *Weinberger*, D. R.I., C.A. No. 4845, decided March 21, 1975, a single-judge district court held the statute unconstitutional. The government has appealed directly to this Court under 28 U.S.C. 1252. *Mathews* v. *Lucas*, No. 75-88, probable jurisdiction noted October 6, 1975.

sustained the constitutionality of the statute, there also is no jurisdiction under 28 U.S.C. 1252.

In any event, the decision below was correct. The Social Security Act provides insurance benefits to surviving dependent children of deceased wage-earners. It is designed to replace the support lost by the death of the wage-earner, and not to provide supplementary income to those who might have claimed support from the wage-earner during his lifetime, but did not do so. The classification to which petitioner objects is designed to distinguish those cases in which the dependency of the child on the wage-earner can reasonably be inferred from those in which it cannot, and to require proof of actual support only in the latter situation. But even if it were, as appellant contends, a classification based on illegitimacy, this Court's decisions do not indicate that strict scrutiny would be required.

The challenged classification is entirely reasonable: it requires either some showing from which dependency can plausibly be inferred, or else proof of actual support. The fact that some children who are deemed dependent under the statutory provisions may not actually be dependent does not render the classification irrational; the categorization serves the legitimate purpose of paying benefits to all dependent children without incurring the administrative burden of case-by-case determinations where there is some basis for presuming dependency. Moreover, the requirements imposed upon the class appellant represents, *i.e.*, of proving that the claimant lived with or

was receiving support from the wage-earner at the time of death, tend to eliminate the need to make paternity determinations in doubtful cases. Finally, since any illegitimate child who can demonstrate dependency is entitled to benefits, the statutory provisions at issue here contain no blanket exclusion of illegitimates.

ARGUMENT

I

THE THREE-JUDGE DISTRICT COURT LACKED JURISDICTION TO ENJOIN OPERATION OF THE ACT

A. The District Court Lacked Jurisdiction Over The Class Aspects of This Suit

Under this Court's decision in *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, the district court lacked jurisdiction over so much of appellant's suit as concerned the class.

1. The named plaintiffs in *Salfi*, a widow whose husband died within nine months of the date of their marriage and her daughter by a previous marriage, had filed applications with the Secretary for mother's and child's insurance benefits. The applications were denied both initially and upon reconsideration at the regional level, because the plaintiffs had not met the duration-of-relationship (marriage for nine months) requirement of Section 216(c)(5) of the Social Security Act, 42 U.S.C. 416(c)(5). Contending that that requirement denied due process, the plaintiffs then instituted a suit for declaratory and injunctive

relief and money damages on behalf of themselves and all others who had been rendered ineligible for benefits as a result of the duration-of-relationship requirement. A three-judge district court granted the requested relief, and the Secretary appealed directly to this Court.

The Court first considered whether the district court had correctly asserted jurisdiction. The second sentence of Section 205(h) of the Act provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." The Court determined that the provision precluded the district court from asserting jurisdiction over the named plaintiffs' complaint, which sought review of the Secretary's decision, at the regional level, denying their application for benefits, "save as [jurisdiction is] provided [by Section 205(g) of] the Act" (slip op. at 6).

Section 205(g) confers jurisdiction upon the federal district courts to review "any final decision of the Secretary made after a hearing * * *." Although the decision denying the plaintiffs' application for benefits had not been made after a hearing, the Court held that the district court had jurisdiction to hear plaintiffs' suit on their own behalf because (1) "a hearing would be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law * * *" (slip op. at 15) and (2) the Secretary had determined

that the reconsideration decision was "final" within the meaning of Section 205(g).

The action on behalf of the members of the class did not seek review of any "findings of fact or decision of the Secretary" within the meaning of the second sentence of Section 205(h). But that action was brought to recover on the class members' claims for survivors' benefits and, the Court noted (slip op. at 4-5), the third sentence of Section 205(h) expressly provides:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§§ 1331, *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act].

Accordingly, the Court held that the district court had lacked jurisdiction over the claims of the unnamed members of the class (slip op. at 12):

> As to class members, * * * the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g). Other sources of jurisdiction being foreclosed by § 405(h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

In this case, appellant's claim for benefits was denied by the Secretary in a "final decision * * * made

after a hearing." See A. 13, 20. Thus, under Section 205(g), the district court had jurisdiction over appellant's individual action for review of the Secretary's decision. But, under *Salfi*, the district court had no jurisdiction over so much of appellant's complaint as concerned the class of "persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that they be living with or supported by their father on the date of his death" (A. 35). Here, as in *Salfi*, "the complaint is deficient in that it contains no allegations that [the members of the class] have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise * * *" (slip op. at 12). Since, as in *Salfi*, the unnamed class members here failed to meet the jurisdictional predicate of Section 205(g), *i.e.*, a final decision by the Secretary made after a hearing to which they were parties, the district court lacked jurisdiction over so much of the complaint as concerns the class.

Appellant apparently contends (Br. 23) that the phrase "otherwise eligible" in the district court's definition of the class restricts that class to persons who have already satisfied the exhaustion requirement of Section 205(g). But the class definition found deficient in *Salfi* also referred to persons "otherwise eligible." *Salfi* v. *Weinberger*, 373 F. Supp. 961, 966 (N.D. Calif.). That phrase is not a talis-

manic invocation of the exhaustion doctrine. To the contrary, it is clear that in broadly defining the class without express reference to the requirement of exhaustion, neither appellant (A. 6) nor the district court (A. 35) gave any consideration to that requirement.[3] Thus the class as defined clearly lay outside the court's jurisdiction under Section 205(g).

Moreover, Section 205(g) permits a suit to be brought only to review "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party." This language manifests a congressional intention of barring class suits and permitting adjudication only of individual claims. Such case-by-case adjudication of individual claims is the only appropriate means for review of administrative decisions, such as those of the Secretary with regard to applications for child's survivor benefits, that inevitably turn upon particular facts. Here, for example, the Secretary found that appellant's father was not living with appellant or contributing to his

[3] Moreover, Section 205(g) requires that an action for review be instituted within 60 days after the mailing of notice of the Secretary's decision. Nothing in the court's definition of the class purports to meet that requirement, which as a condition on a limited waiver of sovereign immunity cannot itself be waived by the Secretary. See *Munro* v. *United States*, 303 U.S. 36; *Whipp* v. *Weinberger*, 505 F.2d 800 (C.A. 6). But see *Salfi*, *supra*, slip op. at 12. Indeed, there is no evidence in the record that, but for appellant, there existed any such class of applicants for child's survivor benefits who had exhausted their administrative remedies within 60 days before the date appellant's complaint was filed.

support at the time of death.[4] The question whether that finding was supported by substantial evidence is unique to appellant; it is not susceptible to resolution in a class action. Similarly unique factual issues would be present in an action brought by any other member of the class appellant purports to represent. Congress understood that resolution of such issues must be on a case-by-case basis. The fact that claimants presenting different factual claims nevertheless share a common constitutional claim does not make proper a procedure, such as a class action, designed to by-pass consideration of the separate factual issues and force class-wide adjudication of a question of constitutional law. Congress has provided in Section 205(g), as an exclusive remedy, an orderly means for litigating individual claims under the Social Security Act; there is no room or need for class actions under that provision.

2. Appellant further argues (Br. 24-34) that jurisdiction over the class existed apart from Section 205(g), under either the mandamus statute, 28 U.S.C. 1361, or the Administrative Procedure Act ("APA"), 5 U.S.C. 701, *et seq.* But that argument is contrary to this Court's holding in *Salfi*, ignores

[4] In his jurisdictional statement, appellant sought review of this determination. He has not discussed that issue in his brief on the merits. Even if, contrary to our contentions here, this Court has jurisdiction over appellant's appeal, we do not believe that it is necessary for the Court to undertake plenary review of that essentially factual issue, which was thoroughly reviewed and correctly decided by both the single-judge and the three-judge district courts (A. 22-29, 34-35).

the evident congressional purpose, and would, if sustained, lead to anomalous results that Congress could not have intended.

a. Appellant's argument is that the third sentence of Section 205(h) precludes only the exercise of federal-question jurisdiction, not the exercise of mandamus or APA jurisdiction. The basis for this argument is that that sentence by its terms bars only actions brought under former "§ 41 of Title 28," which "prior to the 1948 recodification of Title 28 * * * contained all of that title's [general] grants of jurisdiction to United States district courts * * *" (*Salfi, supra,* slip op. at 5, n. 3), whereas the mandamus statute and the Administrative Procedure Act were enacted after the enactment of Section 205(h) and were not comprehended within 28 U.S.C. (1946 ed.) 41 (hereinafter referred to as former 28 U.S.C. 41).[5] In other words, appellant argues that jurisdictional statutes enacted after the enactment of Section

[5] Although appellant apparently also contends that the district court possessed mandamus or APA jurisdiction over his individual claim, that contention is without merit. Appellant's individual action, which seeks review of a decision of the Secretary, is governed not only by the *third* sentence of Section 205(h), but also by the *second,* which precludes such review "except as herein provided," *i.e.,* except as provided by Section 205(g). Thus, whatever scope appellant may attribute to the third sentence, the second sentence flatly bars the district courts from exercising mandamus or APA jurisdiction over actions, such as that brought by appellant on his own behalf, instituted to obtain review of a decision of the Secretary. See also pp. 5-8 of our supplemental and reply brief in *Mathews* v. *Eldridge,* No. 74-204.

205(h), and not as an amendment to former 28 U.S.C. 41, confer jurisdiction over claims arising under the Social Security Act, without regard to the broad jurisdictional bar interposed by the third sentence of Section 205(h).

That argument was rejected by this Court in *Salfi.* In *Salfi,* as here, the plaintiffs had alleged jurisdiction under, *inter alia,* the mandamus statute and the Administrative Procedure Act. See p. 7 of the *Salfi* Appendix. This Court, however, expressly held that "[o]ther sources of jurisdiction [are] foreclosed by § 405(h)" (slip op. at 12) and ordered dismissal of so much of the complaint as concerned the class, due to the class' failure to "satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g)" (*ibid.*).

b. The *Salfi* decision furthers the evident congressional objective of freeing the courts from the burden of premature and unnecessary Social Security litigation. That objective emerges clearly from a close analysis of Section 205(h). The second sentence of that Section imposes upon all litigants seeking review of any "findings of fact or decision of the Secretary" the exhaustion requirement of Section 205(g). The third sentence of Section 205(h) deals comprehensively with all actions involving claims under Title II of the Act, whether or not adjudication of those claims would entail review of findings of fact or a decision by the Secretary. As the Court noted in *Salfi* (see p. 14, *supra*), that sentence by its terms bars actions brought under the former 28 U.S.C. 41, which, at the time Section 205(h) was

enacted in 1939 (53 Stat. 1371), contained all of Title 28's possibly relevant grants of jurisdiction to United States district courts. By referring to that provision, Congress evidently intended to effectuate a comprehensive denial of Title 28 jurisdiction. Thus the statutory scheme bars all actions asserting claims under the Social Security Act, except for actions seeking review of findings or a decision by the Secretary, and bars the latter actions as well, except insofar as they meet the requirements of Section 205 (g).

Later grants of jurisdiction to the district courts should not be interpreted as impliedly altering this statutory scheme, whether or not such grants were technically comprehended within the former 28 U.S.C. 41. In the absence of an express congressional intent to the contrary, such later-enacted jurisdictional provisions should be read as subject to the broad jurisdictional bar of Section 205(h). And there is nothing in the legislative history of either the mandamus statute or the Administrative Procedure Act[6]

[6] We do not here concede that the Administrative Procedure Act constitutes an independent grant of jurisdiction. The courts of appeals are divided on this question. Compare, *e.g.*, *Bramblett* v. *Desobry*, 490 F.2d 405 (C.A. 6), certiorari denied, 419 U.S. 872, with *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (C.A. D.C.). We note here only that the Act would, at most, confer jurisdiction to try actions seeking review of "[a]gency action made reviewable by statute and [certain other] final agency action" (5 U.S.C. 704), brought by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C. 702). Thus that Act would under no circumstances confer jurisdiction over the suit brought on behalf of the unnamed class members here, who were not affected by the Secretary's denial of benefits to appellant.

that would suggest a congressional intention of fundamentally reorganizing the statutory scheme governing judicial review in Social Security cases.

c. Appellant notes (Br. 25) that in 1939 the United States District Court for the District of Columbia had jurisdiction over suits for mandamus against federal officials, which derived not from Title 28 but from the pre-cession laws of Maryland. Appellant argues that the third sentence of Section 205 (h) preserved this jurisdiction over actions to recover on claims arising under Title II of the Social Security Act, and that the later enactment of the mandamus statute merely extended such jurisdiction to the other federal district courts. We disagree. For the reasons set forth above, it is clear that Congress intended in Section 205(h) to assert sovereign immunity as a bar to judicial consideration of all suits to recover on such claims, except as jurisdiction was provided by Section 205(g). Appellant's argument to the contrary makes nonsense of the statutory scheme. There is no apparent reason, and appellant suggests none, why Congress would have carefully foreclosed all sources of jurisdiction for all federal district courts but one, which would exercise the extraordinary, but inherently limited, power of mandamus.

But appellant's argument confronts a more fundamental paradox as well. The second sentence of Section 205(h), together with Section 205(g), bars *all* actions for review of nonfinal decisions of the Secretary. It is clear beyond debate that that sentence prohibits such actions from being brought in the guise of suits for mandamus: it expressly allows review of such actions only "as herein provided," *i.e.*, as provided by Section 205(g). Thus a claimant who has obtained an initial or interim adverse decision by the Secretary may not secure judicial review until he exhausts his administrative remedies; and once he has exhausted his remedies, review is available only under Section 205(g) and not under any mandamus statute. But, paradoxically, under appellant's argument the federal district courts would have mandamus jurisdiction over those suits that are brought by individuals who have not yet filed a claim with, or obtained an initial decision from, the Secretary. In other words, appellant's argument resolves into the contention that Congress intended to preserve the unique mandamus jurisdiction of the District of Columbia courts, but only with respect to claims concerning which there had been no findings of fact or decision by the Secretary, *i.e.*, only with respect to the claims *least* ripe for judicial review. That anomalous result would advance no sound policy. Congress cannot be assumed to have intended it.

B. The District Court's Jurisdiction Over Appellant's Individual Claim Did Not Carry With It Authority To Enjoin The Operation Of The Act

As we have demonstrated above, the district court had no jurisdiction over so much of the complaint as concerned the class, and its jurisdiction over appellant's individual claim derived exclusively from Section 205(g) of the Social Security Act. We now show that the court had no authority under that provision to enjoin the operation of the Act.

1. This Court correctly noted in *Salfi* that the text of Section 205(g) "contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court" (slip op. at 11, n. 8): nothing in Section 205(g) suggests that Congress intended to authorize the district courts assuming jurisdiction thereunder to exercise the equitable power to enjoin the operation of a federal statute. To the contrary, the grant of jurisdiction is limited to the "power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." The statute confers no power beyond that necessary to enforce decrees in individual cases.[7]

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[7] In contrast, see, *e.g.*, 28 U.S.C. 2349 (governing review of certain administrative orders in the courts of appeals), which expressly authorizes the court to enter a judgment "determining the validity of, and enjoining, * * * in whole or in part, the order of the agency." See also 15 U.S.C. 21(c) and 45(c).

Equitable remedies such as injunction are, of course, extraordinary forms of relief, available only where there is no adequate remedy of law. This is so because, unlike the traditional legal remedies, injunctions are coercive instruments, "wholly preventive, prohibitory, or protective." 4 Pomeroy, *Equity Jurisprudence* 934 (5th ed.). Congress could reasonably determine that it is inappropriate, unseemly, and unnecessary for the courts to subject the Secretary to such coercion when the basic dispute between the individual plaintiff and the Secretary is merely whether the Secretary erred in deciding a question of fact or law adversely to the plaintiff—a dispute that may in all appropriate cases be finally resolved in favor of the plaintiff by the simple expedient of "modifying, or reversing," the Secretary's decision.[8] Thus the absence of any express language in Section 205 (g) empowering the district court to exercise injunctive powers should not be regarded as a mere inadvertence. To the contrary, it appears to represent the considered determination by Congress to withhold

[8] The legislative history indicates that Congress intended only that "any individual may obtain a review of any final decision of the Board made after a hearing to which he was a party * * *" (H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939)), *i.e.*, to permit judicial review of the Secretary's determinations of individual cases, not to subject the entire administration of the statute to judicial interdiction.

such powers from the courts in this class of cases, and to confine the courts to the remedies of affirmance, modification, and reversal spelled out in the statute, and to the powers necessary to enforce those remedies in individual cases.[9]

It is especially significant in this context that, as we have shown, Sections 205(g) and (h) provide only for case-by-case review of individual claims, after the individual has exhausted his administrative remedies. Such a statutory scheme renders superfluous the exercise of injunctive power: under such a scheme, every claimant properly before the court who establishes a meritorious claim may obtain fully adequate relief without issuance of an injunction restraining the operation of the statute. If the claimant's contentions, constitutional or otherwise, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). An order reversing the Secretary's decision and requiring payment of benefits is tantamount to the entry of a money judgment in the plaintiff's behalf and provides him with full compensation for the value of his claim; it therefore

[9] In the exercise of those powers, a court may of course issue an order requiring the payment of benefits to a particular claimant. But such an order enforcing a judgment in a particular case does not enjoin the operation of the statute within the meaning of 28 U.S.C. 2282. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 153-155; *Salfi, supra*, slip op. at 11, n. 8.

constitutes an adequate and complete remedy at law and thus excludes the entry of further equitable relief. 4 Pomeroy, *supra*, at 936. Cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 404.

Further injunctive relief would have no utility to the claimant. In this case, for example, appellant's individual claim would be fully satisfied by an order reversing the Secretary's denial of benefits. The injunctive relief he seeks is, as a practical matter, not for himself but for that class of persons who, unlike appellant, have not exhausted their administrative remedies and therefore as to whom there is no decision of the Secretary subject to affirmance, modification, or reversal. But Congress, in denying the district court's jurisdiction to consider the claims of that class, must be deemed to have barred the courts from entertaining requests for broad injunctive relief on its behalf.[10]

2. This is a case, therefore, properly calling for the application of the well-settled principles summarized in *United States* v. *Babcock*, 250 U.S. 328, 331:

> (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts. * * * (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive.

[10] Although, as appellant points out (Br. 21), the lack of an injunctive remedy could conceivably lead to a multiplicity of suits if the government chose not to seek direct review in this Court under 28 U.S.C. 1252 of a district court determination that a part of the Act is unconstitutional, as a practical matter such a result does not appear likely. Efficient administration of the Act requires prompt resolution of substantial questions concerning the constitutionality of any of its provisions.

As discussed above, both the text of Section 205(g) and the general statutory scheme governing review of social security cases demonstrate that Congress in such cases intended to provide a special and exclusive remedy, *i.e.*, judicial review of individual decisions of the Secretary made after an administrative hearing, and to withhold any general equitable power from the district court. Accordingly, this case is not governed by the decisions of this Court that infer the existence of broad equitable authority when Congress has, in the pertinent legislation, explicitly authorized a court to exercise its equitable powers. Those decisions establish that a limited grant of equity jurisdiction need not be construed as barring the courts from providing complete equitable relief. See, *e.g.*, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292. The predicate, however, for the application of the principle for which such decisions stand is a congressional manifestation of a determination to vest the reviewing court with at least a modicum of equity jurisdiction. Thus, in *Porter* v. *Warner Co.*, 328 U.S. 395, involving the power of the district court under Section 205(a) of the Emergency Price Control Act of 1942 to order restitution of rents collected by a landlord in excess of the maximum permitted by the statute, the Court noted that the stat-

ute "expressly envisages applications by the Administrator for orders enjoining violations of the Act * * *" (328 U.S. at 399) and thus it was appropriate to effectuate the statutory objective by inferring the existence of the further equitable power to order restitution. In determining that Congress had not intended to preclude restitution the Court stated (328 U.S. at 403):

> This is not a situation where a statute has created a right and has provided a special and exclusive remedy, thereby negativing any jurisdiction that might otherwise be asserted. *United States* v. *Babcock*, 250 U.S. 328. * * * Rather it is an occasion where Congress has utilized, save in one aspect, the broad equitable jurisdiction that inheres in courts * * *.

See also *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, *supra*, *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, and *United States* v. *Morgan*, 307 U.S. 183, all of which infer a grant of broad equitable authority from a statute containing an express, but limited, grant of equitable power.

Unlike the statutory provisions involved in the above decisions, however, Section 205(g) contains no grant of equitable power; Congress did not signify in that statute its intent that the district court shall exercise equity jurisdiction of any kind. Rather, both the language of the statute and the legislative scheme

indicate that Congress intended to withhold such authority from the district court. There is, therefore, no warrant for the appellant's contention that the power to enjoin a federal statute may simply be inferred.

It follows from the foregoing that this Court lacks jurisdiction of this appeal. For, as the Court itself has said (*Salfi*, *supra*, slip op. at 11, n. 8):

> If a § 405(g) court is not empowered to enjoin the operation of a federal statute, then a three-judge District Court was not required to hear this case, 28 U.S.C. § 2282, and [the Court is] without jurisdiction under 28 U.S.C. § 1253.

Convocation of a three-judge district court is required under 28 U.S.C. 2282 when a plaintiff requests an "injunction restraining the enforcement * * * of any Act of Congress for repugnance to the Constitution of the United States * * *." But Section 2282 can operate only where there is jurisdiction in the district court to grant the requested injunctive relief. Since Section 205(g) does not authorize the courts to enjoin the operation of provisions of the Social Security Act, the district court in this case lacked jurisdiction to entertain the appellant's request for such a decree and the convening of a three-judge court was therefore improper. Cf. *Richardson* v. *Morris*, 409 U.S. 464. Consequently, this Court lacks jurisdiction of this direct appeal under 28 U.S.C. 1253, which authorizes appeals only in cases "required * * * to be heard and determined by a district court of three judges." See *Swift & Co.* v. *Wickham*, 382 U.S. 111,

114.[11] This Court also lacks jurisdiction under 28 U.S.C. 1252, for the district court sustained the constitutionality of the challenged statutory provisions. Cf. *Salfi*, *supra*, slip op. at 11, n. 8. In these circumstances, the Court should vacate the judgment below to permit entry of a fresh judgment, from which appellant may, if he so desires, appeal to the court of appeals. See, *e.g.*, *Dickson* v. *Ford*, 419 U.S. 1085.

In any event, as we now show, the three-judge district court's decision on the merits was correct; the challenged statutory provisions are constitutional.

[11] This court re-emphasized last term that the provisions relating to three-judge courts are to be narrowly construed in light of their underlying purpose (*Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 97-98):

> Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge. But some of the literal words of the statutory apparatus bear little or no relation to that underlying policy, and in construing these we have stressed that the three-judge-court procedure is not "a measure of broad social policy to be construed with great liberality." * * *
>
> The words of § 1253 governing this Court's appellate jurisdiction over orders denying injunctions fall within this canon of narrow construction. Whether this jurisdiction be read broadly or narrowly, there will be no impact on the underlying congressional policy of ensuring this Court's swift review of three-judge-court orders that *grant* injunctions. Furthermore, only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration.

Accord: *MTM, Inc.* v. *Baxley*, 420 U.S. 799.

II

SECTIONS 202(d)(3) AND 216(h)(3)(C)(ii) DO NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Challenged Statutory Provisions Must Be Sustained If They Have A Rational Basis

In considering whether the legislative classification at issue here comports with the Due Process Clause, it is first necessary to determine the appropriate standard of review. We submit that the proper standard is the traditional rational basis test enunciated in *Dandridge* v. *Williams*, 397 U.S. 471, and recently reaffirmed in *Weinberger* v. *Salfi*, *supra*.

1. Appellant claims (Br. 39-43) that the challenged statutory provisions must be subjected to strict judicial scrutiny, since, he alleges, a suspect classification is involved. But the constitutional validity of the statutory scheme governing payment of child's survivor benefits to illegitimate children need not rest upon the showing of a "compelling governmental interest" required of statutes that discriminate on the basis of a "suspect category" such as race. Illegitimacy is not the statutory criterion but only one factor bearing upon the issue of proof of dependency. Dependency is the test and it cannot be said to constitute a "suspect category." The Social Security Act does not place illegitimate children in a unique and wholly separate category. Under Sec-

tions 202(d) and 216(h) of the Act, many, if not most, illegitimate children are entitled to the same presumption of dependency that is accorded most legitimate children. Moreover, the requirement of proving dependency in certain cases, as a condition of eligibility for child's insurance benefits, is not one imposed upon illegitimate children alone. Legitimate children who have been adopted by a person other than the wage-earner and stepchildren claiming under the account of a stepparent must make the same (or, in the case of stepchildren, a more stringent), showing of actual dependency. See pp. 3-5, *supra*. Thus the requirement of proof of actual dependency that appellant challenges here as discriminating against illegitimate children does not in fact discriminate against children on the basis of illegitimacy; that requirement is imposed in a variety of circumstances where the more readily documented facts pertaining to the relationship between the wage-earner and the child do not of themselves suggest the likelihood of actual dependency.

But even if we assume, *arguendo*, that the statute does discriminate in the manner appellant contends, that fact alone would not subject the statute to strict scrutiny. Illegitimacy has not been, nor should it be, declared a "suspect category." Illegitimacy of birth differs importantly from the categories that have been viewed as suspect and hence subject to strict scrutiny. Illegitimacy is not a highly visible characteristic, and the status can be changed. See *Frontiero* v. *Richardson*, 411 U.S. 677, 686-687. Accordingly, this Court has used the traditional "reasonable basis" standard to distinguish between statutes that classify individuals on the basis of legitimacy of birth without adequate justification and those that, as here, employ such a classification to further appropriate governmental interests. See *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619; *Gomez* v. *Perez*, 409 U.S. 535; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164; *Labine* v. *Vincent*, 401 U.S. 532; *Levy* v. *Louisiana*, 391 U.S. 68; *Glona* v. *American Guarantee Co.*, 391 U.S. 73; *Jimenez* v. *Weinberger*, 417 U.S. 628.

This Court has, in recent years, frequently been importuned to expand the category of "inherently suspect" classifications and thereby accord additional groups the extraordinary protection entailed by the requirement that such classifications be supported by "compelling government interests"—a requirement that, for all practical purposes, is never met. See Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534, 1535, n. 9 (1974). Thus, in addition to illegitimates, the elderly (*McIlvaine* v. *Pennsylvania State Police*, 6 Pa. Cmwlth. 505, 296 A.2d 630, affirmed, 454 Pa. 129, 309 A.2d 801, appeal dismissed for want of a substantial federal question, 415 U.S. 986), the poor (*San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1), and women (*Frontiero* v. *Richardson*, 411 U.S. 677; *Kahn* v. *Shevin*, 416 U.S. 351; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636), have urged this

Court to give strict scrutiny to classifications affecting them, and in each instance the Court has declined to do so. In view of these decisions, there would appear to be no basis upon which to distinguish classifications based upon illegitimacy from other classifications that have not been elevated to "suspect" status. The traditional "reasonable basis" test is sufficient to safeguard the interest of the class appellant seeks to represent, and it preserves Congress' prerogative to legislate with respect to that class in a manner designed to further appropriate governmental interests.

2. This Court summarized the "rational basis" test in *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426.

In *Weinberger* v. *Salfi*, *supra*, slip op. at 16-18, the Court reaffirmed the applicability of the "reasonable basis" test in cases, such as this one, arising under social welfare legislation. See also *Richardson* v. *Belcher*, 404 U.S. 78; *Flemming* v. *Nestor*, 363 U.S. 603.

Since this case, like *Salfi*, *Dandridge*, *Richardson*, and *Nestor*, involves not "freedoms guaranteed by the Bill of Rights" (*Dandridge*, *supra*, 397 U.S. at 484), but benefits provided by statute "[i]n the area of * * * social welfare" (*id.* at 485), the traditional "rational basis" test governs the validity of the Social Security Act provisions here in question. Thus, the challenged statutory classification must be sustained if there is any rational reason for that classification; and "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." *Flemming* v. *Nestor*, *supra*, 363 U.S at 612 (citations and footnote omitted).

3. The three-judge district court below, however, sustained the classification under a stricter, intermediate test, under which a challenged classification "must bear a direct and primary correlation to an *actual* statutory goal or purpose" (A. 38; emphasis supplied). The court apparently applied that standard of review both because it concluded that this Court had abandoned the traditional test (A.

37), and because it considered that a somewhat more stringent scrutiny was required of "laws dealing with illegitimacy" (A. 39). We believe that the court erred in departing from the "reasonable basis" test which, as we have shown above, this Court has not abandoned but, to the contrary, has applied in recent cases involving classifications based upon legitimacy. But we now show that the statutes here in question both have a "reasonable basis" within the meaning of the traditional test and, as the court below correctly determined, are reasonably designed to achieve the actual legislative purpose of "replac[ing] the support lost to a child when the wage earner dies" (A. 46).

B. The Statutes Have A Rational Basis And Further The Legislative Purpose

1. *Child's survivor benefits are designed to replace the support lost by virtue of the wage-earner's death*

Appellant fundamentally misconceives the congressional intent underlying the statutory scheme for the payment of child's survivor benefits. His case rests upon the assumption that Congress intended to provide, *inter alia*, a new source of support for a child who had never received assistance from the wage-earner during his lifetime, simply on the basis of the child's inchoate right, never asserted or recognized during the wage-earner's lifetime, to the wage-earner's support under state law. It is, to the contrary, clear that Congress intended only to replace

the support that was lost by virtue of the wage-earner's death and had no intention of furnishing benefits on the basis of an inchoate right to support, such as that now claimed by appellant, that was not asserted or recognized, either formally or casually, during the wage-earner's lifetime. As this Court has observed, "the primary purpose of [child's insurance benefits] is to provide support for *dependents* of a * * * wage earner." *Jimenez* v. *Weinberger*, *supra*, 417 U.S. at 634 (emphasis added). See also *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), affirmed, 409 U.S. 1069; *Watts* v. *Veneman*, 476 F.2d 529, 533 (C.A.D.C.).

The plain language of the statutory provisions at issue here, as well as the pertinent legislative history, demonstrates that child's survivor benefits are social *insurance* benefits intended to replace lost support and not *welfare* benefits intended to assist needy persons whether or not they had any economic relationship with the deceased wage-earner. Cf. *Gainville* v. *Richardson*, 319 F. Supp. 16 (D. Mass.).[12] Section 202

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[12] Appellant suggests (Br. 57) that his need for benefits is greater than those who were supported by their deceased fathers and thus that a decision to exclude him from benefits is unfair. But that contention concerns a matter of nonconstitutional social policy peculiarly within the province of Congress, which has the responsibility for allocating the finite public funds available for social welfare. See *Dandridge* v. *Williams*, *supra*, 397 U.S. at 487; *Weinberger* v. *Salfi*, *supra*, slip op. at 29-33.

(d)(1)(C) of the Social Security Act expressly restricts eligibility for child's insurance benefits to children who were "dependent upon [the wage-earner]." The Senate Report on the 1965 Amendments to the Act—which added the provisions challenged here—correctly describes the Act as a "national program that is intended to pay benefits to replace the support lost by a child when his father * * * dies * * *." S. Rep. No. 404, 89th Cong., 1st Sess. 110 (1965).

The congressional intent also is directly inferable from the structure of the statutory scheme. The basic eligibility requirement is, as we have seen, that the child have been "dependent upon [the wage-earner]." But Congress understandably chose to avoid imposing upon claimants and the Secretary the necessity of case-by-case determinations of the fact of dependency. Instead, Congress provided a short-cut procedure for proving actual dependency by circumstantial evidence. Thus dependency is presumed where the readily documented facts pertaining to the relationship between the wage-earner and the child suggest the likelihood of actual dependency, *i.e.*, dependency is presumed where the child is able to show (1) that he is the legitimate child of the wage-earner and has not been adopted by another individual or (2) that he is the illegitimate child of the wage-earner as a result of a legal impediment to the validity of his parents' marriage ceremony or (3) that the wage-earner had acknowledged the child in writing, had been decreed by a court to be the child's parent, or had been ordered by a court to contribute to the

child's support as a parent. Sections 202(d)(3), 216(h)(2)(B) and (h)(3)(C)(i). Where proof of such facts is not available, dependency will further be presumed if the child can establish that the wage-earner was his parent and was living with him at the time of death; the fact of cohabitation is accepted as circumstantial proof of the fact of support, which ordinarily may be more difficult to establish. Section 202(d)(1)(C)(ii). Direct proof of actual support is required only when the more readily documented circumstantial proof is not made. But it is expressly required, of legitimate children and stepchildren as well as of illegitimates, when other proof fails. This statutory structure, which is undergirded by the requirement that the child be "dependent upon [the wage-earner]," "belies the conclusion that the Act is directed to *potential* dependency" (A. 47; emphasis supplied).[13] Thus the district court correctly concluded (A. 50):

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[13] In contending that Congress intended to furnish benefits to all children who had an inchoate right to support from the wage-earner during his lifetime, appellant refers (Br. 49) to the statement in the Conference Committee Report on the 1965 Amendment to the Act (111 Cong. Rec. 18387 (1965)):

> A child would be paid benefits based on his father's earnings without regard to whether he has the status of a child under State inheritance laws if the father was supporting the child or *had a legal obligation to do so.* [Emphasis added.]

As the district court observed, however (A. 47, n. 6), the italicized language upon which appellant relies "was not speaking of § 416(h)(3)(C)(ii) alone, but was also talking in reference to § 416(h)(3)(C)(i) which established the

> [Appellant's] problem—and the underlying reason for his failure to qualify—is that the child's insurance benefits provisions of the Social Security Act were never intended to cover [him] or the class he represents. These provisions were designed, not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended.

2. *The statutory scheme has a reasonable basis and furthers the legislative objective*

a. The district court correctly held that the statutory scheme outlined above is a means of carrying out the legislative purpose of providing replacement benefits and serves the government's legitimate interest in requiring some showing, on the part of children applying for benefits, from which dependence upon the deceased wage-earner may be reasonably inferred. Dependency is the predicate for the payment of child's insurance benefits. The provisions appellant challenges merely impose the burden of proving actual dependency on claimants who have failed to make a satisfactory circumstantial showing of dependency, *i.e.*, on claimants who have failed to prove circumstances from which the likelihood of dependence can reasonably be inferred. Thus appellant's underlying contention is that the circumstantial evidence that the Act, through the statutory presumptions, accepts as proof of dependency is not a sufficient

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paternity decree, court order, or written acknowledgement test"—circumstances which generally create a legal entitlement to support.

basis from which the fact of dependency can be reasonably inferred.

Appellant argues that many children, legitimate and illegitimate, who are given the benefit of the statutory presumptions could not in fact prove dependency any more than he can. Thus, in effect, appellant objects to the generosity of the presumptions and contends that since Congress is willing to presume support on the basis of less than conclusive evidence, it may not reasonably refuse to provide benefits even in cases where there is neither any basis from which to presume support nor any evidence of actual support. But as this Court recently re-emphasized in *Salfi* (slip op. at 24-33), legislative classifications need not be drawn with mathematical accuracy. Indeed, the classification at issue in *Salfi* was at least equally subject to the type of attack appellant makes here, since it is evident that a woman who marries a wage-earner less than nine months before his death is often not motivated by a desire to receive survivors' benefits; nevertheless, that categorization was reasonably related to the desire to avoid the payment of survivors' benefits in the case of marriages that were so motivated. Similarly, although many children deemed dependent under the Act may in fact not be dependent, the presumptions employed by the Act serve the legitimate purpose of ensuring payment of benefits to all actually dependent children while avoiding imposition of the administrative burden that would be entailed by case-by-case dependency determinations.

These statutory presumptions are not unreasonable. As the district court observed with regard to the categories of illegitimates now entitled to the presumption of dependency (A. 48-49):

> When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not. To presume the child's paternity and dependency is rational.[14]

Although legitimates are broadly presumed dependent upon their parents, this presumption has

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[14] The statute also affords the dependency presumption to illegitimates born of a marriage invalid because of the existence of a non-obvious legal impediment at the time of marriage. Section 216(h)(2)(B). That presumption is justifiable because the wage-earner intends his child to be legitimate, and thus has signified his readiness to assume the responsibility of support.

In *Jiminez* v. *Weinberger*, 417 U.S. 628, 631, n. 2, this Court observed, in passing, that illegitimate children who can inherit their parent's personal property under the pertinent state intestacy laws are entitled to child's survivor benefits. This observation was, we believe, based upon a misreading of the Act. The requirement that certain illegitimate children must establish dependency is not affected by whether the child would inherit from the wage-earner under

ample support in human experience. Congress properly determined that the circumstances in which the presumption would be erroneous were likely to be so few that the risk of making payments to non-dependents was outweighed by the savings inherent in avoiding case-by-case dependency determinations for all legitimate children. Moreover, when Congress was able to isolate a class of legitimate children with regard to whom the presumption might be generally unsound, it denied the presumption. Thus adopted children seeking to recover on the account of their legitimate natural parent, or children seeking to recover on the account of a stepparent, are required to prove cohabitation with or actual support from the wage-earner. In cases where there is no cohabitation, there is so scant a likelihood of the child's dependence upon the wage-earner, that Congress has required the same showing as is required of the subclass of illegitimate children that appellant represents. The challenged statute, therefore, as the district court said, "does not treat legitimate children differently from illegitimate children; what it does is treat differently those likely to be the dependent children of the wage earner from those not as likely to be by requiring further or substantiating proof from the lat-

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the state's intestacy laws. Relationship as a child of the wage-earner for purposes of state intestacy laws establishes only the applicant's status as a "child"; it does not establish either legitimacy or dependency. See Sections 202(d)(3) and 216(h)(2)(A); Social Security Claims Manual §§ 2408, 2418, 2421 (March 1975); Social Security Ruling 61-48, 1960-1961 Cum. Bull. 31.

ter" (A. 49). The reasonableness, and hence the constitutionality, of a statutory requirement of proof in these circumstances is manifest.[15]

b. This Court has consistently recognized the "lurking problems with respect to proof" of claims asserted by illegitimate children to benefits earned by their putative fathers (*Gomez* v. *Perez*, 409 U.S. 535, 538) and has indicated that a requirement of proof of dependency is an appropriate limitation on such claims. Thus, in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 174-175, while holding that there was no rational basis for a Louisiana statute that distinguished between two classes of dependent illegitimate children, this Court emphasized the propriety of a dependency test:

> Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful-death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased,

[15] *Frontiero* v. *Richardson*, 411 U.S. 677, is inapposite here. That decision involved a legislative classification broadly distinguishing between men and women, requiring all members of the latter class to prove the dependency of their spouses, while affording a conclusive presumption to the former. In striking down the statute involved in *Frontiero*, the Court held that administrative convenience would not justify the wholesale discrimination involved in that case. In contrast, the statute challenged here does not broadly distinguish between legitimate and illegitimate children, but affords the benefit of the presumption to all classes of children to which it may reasonably be afforded.

> Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood. Our decision fully respects Louisiana's choice on this matter. It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and it avoids altogether diffuse questions of affection and affinity which pose difficult probative problems. [Footnote omitted.]

Thus the Court in *Weber* specifically approved the requirement that an illegitimate child prove dependency and paternity (406 U.S. at 174, n. 12), a requirement that was not significantly different from the challenged provisions here, which require proof of both paternity and dependence. In both cases, the dependency requirement tends to eliminate the need to make paternity decisions in doubtful cases, and thus, as this Court noted in *Weber*, to simplify problems of proof of paternity.[16]

c. Finally, it should be emphasized that the statutory scheme challenged by appellant does not establish the "blanket and conclusive exclusion of * * * illegitimates" (*Jimenez* v. *Weinberger*, *supra*, 417 U.S. at 636) which this Court has so frequently condemned

[16] Contrary to appellant's contention (Br. 61-70), the fact that the statute requires independent proof of paternity and has other provisions to guard against fraudulent claims does not preclude the possibility that one of the purposes of the dependency requirement was to simplify problems of proof by eliminating a substantial category of cases in which proof could be expected to be particularly difficult and fraud most likely.

as violative of the Constitution. See *Levy* v. *Louisiana*, 391 U.S. 68, and *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (invalidating the portion of Louisiana's wrongful death statute that barred illegitimate children, and their parents, from recovering for wrongful death); *Gomez* v. *Perez*, *supra* (invalidating a Texas statute denying illegitimate children a judicially enforceable right to support from their fathers while granting such a right to legitimates); cf. *Weber* v. *Aetna Casualty & Surety Co.*, *supra*. Thus in *Jimenez* the Court invalidated Section 216 (h)(3)(B) of the Social Security Act, which barred a subclass of illegitimates from even making a showing of dependency upon the wage-earner, and remanded the case to provide the claimants with an opportunity to prove that critical fact. The district court properly held in the instant case that *Jimenez* does not impugn the validity of the statute at issue here, which grants benefits to any illegitimate child who establishes his dependence on his deceased parent (A. 76):

> [T]he thrust of that opinion was that Eugenio and Alicia Jimenez, and the members of their class, could not be refused benefits without their first being afforded a realistic opportunity to prove that they were living with their parent or supported by him.[17]

[17] The district court also correctly observed that the statute does not contain the vice of "underinclusiveness" present in *Jimenez*. While there may be "*nondependent* children who cannot recover, there will be no *dependent* children who are unable to prove dependency at the requisite time" (A. 77).

That opportunity was adequately furnished appellant in this case.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

KEITH A. JONES,
Deputy Solicitor General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys.

OCTOBER 1975.

STATUTORY APPENDIX

Section 202, 42 U.S.C. 402

* * * * *

(d) Child's insurance benefits.

(1) Every child as defined in section 216(e) of this Act of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 223(d) of this Act which began before he attained the age of 18, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits.

shall be entitled to a child's insurance benefit * * *.

* * * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) of this Act shall be deemed to be the legitimate child of such individual.

(4) A child shall be deemed dependent upon his stepfather or a stepmother at the time specified in paragraph (1)(C) of this subsection, if, at such time, the child was living with or was receiving at least one-half of his support from such stepfather or stepmother.

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Section 205, 42 U.S.C. 405

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(g) Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after

the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the

Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision.

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of the Judicial Code of the United States to recover on any claim arising under this subchapter.

* * * * *

Section 216, 42 U.S.C. 416

* * * * *

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, and (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother

or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

* * * * *

(h) Determination of family status.

* * * * *

(2) (A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such

insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * * * *

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to

have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6212

GREGORY NORTON, JR., etc.,
Appellant,

v.

F. DAVID MATHEWS, Secretary,
Department of Health, Education,
and Welfare,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MARYLAND

REPLY BRIEF FOR APPELLANT

C. CHRISTOPHER BROWN
University of Maryland School
of Law
500 W. Baltimore Street
Baltimore, Maryland 21201

DENNIS SWEENEY
Legal Aid Bureau, Inc.
341 N. Calvert Street
Baltimore, Maryland 21202

Attorneys for Appellant

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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REPLY BRIEF FOR APPELLANT

The following comments reply to the Government's assertions that jurisdiction is lacking in this case and that the challenged statutory provision can pass constitutional scrutiny. Appellant also brings several recent federal court decisions to the Court's attention, most of which have attempted to apply the import of

Weinberger v. Salfi, ____ U.S. ____, 95 S.Ct. 2457 (1975), to other constitutional challenges to portions of the Social Security Act.

I.

JURISDICTION

The Secretary asserts that because injunctive and class-wide relief are congressionally barred in a case such as this, a three-judge court was not required to entertain appellant's complaint and accordingly proper jurisdiction over this appeal lies in the Fourth Circuit.

The Secretary has, in effect, asserted that Rules 23 and 65 of the Federal Rules of Civil Procedure have no applicability to a case such as appellant has brought. He argues that Congress, by enacting 42 U.S.C. § 405(g), intended to bar class suits, thereby "permitting adjudication only of individual claims" (Govt. Br. 12), and "must be deemed to have barred courts from entertaining requests for broad injunctive relief. . . ." (Govt. Br. 22).

The Secretary points to no congressional language or history to support this unique thesis. Congress has, however, granted social security claimants the right to bring "a civil action" to challenge any decision of the Secretary. *See* 42 U.S.C. § 405(g). This "civil action" would seemingly be no different than that which is covered by Fed. R. Civ. P. 2 & 3. There is every indication in the Rules that they all apply, if their conditions are met, "to all suits of a civil nature. . . ." Fed. R. Civ. P. 1. Social security benefit cases have not been excluded from the Rules' coverage. *See* Fed. R. Civ. P. 81.

All or a part of appellant's class should not be automatically deprived of their rights to emergency or temporary injunctive relief under Fed. R. Civ. P. 65(a) & (b). Injunctive relief is mandatory to force the Secretary to enforce a court's declaration of the invalidity of a portion of the Social Security Act. The Secretary has not stopped enforcing the "support or residency" requirements even though the federal courts in *Tanner v. Weinberger*, ____ F.2d ____, 44 U.S. L. Wk. 2209 (6th Cir. 1975), and *Lucas v. Weinberger*, 390 F.Supp. 1310 (D.R.I. 1975), *appeal pending* No. 75-88, have held them to be unconstitutional. A litigant should surely have the right to establish his or her irreparable harm and likelihood of success on appeal and thereby secure prompt and complete injunctive relief. Without the availability of injunctive relief, the Secretary is guaranteed an automatic stay of judgment. And if proper compliance were not forthcoming after this Court's final constitutional mandate, a district court should have the injunctive tool to enforce its judgment. *Compare Bell v. Hood*, 327 U.S. 678, 684 (1946). As the Second Circuit has noted,

> The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action.

Bivens v. Six Unknown Named Agents, 409 F.2d 718, 723 (1969), *aff'd* 403 U.S. 388 (1971).

The inconsistent federal court rulings on this issue also highlight the propriety of class relief to eliminate the risk of "inconsistent or varying adjudications . . . which could establish incompatible standards of conduct" for the Secretary and an unnecessarily adverse *res judicata* effect upon a claimant who has already lost this constitutional fight. *See* Fed. R. Civ. P. 23(b)(1).

As the Seventh Circuit has pointed out in *Jimenez v. Weinberger*, 523 F.2d 689 (1975) (Stevens, J.), there is no bar in 42 U.S.C. § 405(g) or *Weinberger v. Salfi, supra,* to class relief in a case such as this. Section 405(g) contains three major exhaustion requirements, each of which has been met by the class in this case.

First, judicial review can only be had after "a final decision of the Secretary made after a hearing." 42 U.S.C. § 405(g). As in *Jimenez II,* appellant's class consists of those denied benefits "solely" because they cannot meet the challenged portion of the Act (App. 35). *See* 523 F.2d at 695 n.10. By necessity, therefore,

> the class whose claims were properly before the district court was made up of applicants whose applications had progressed to a high enough level in the administrative proceedings where it could be . . . determined "that the claim[s] [were] neither otherwise invalid nor cognizable under a different section of the Act."

Id. quoting *Salfi v. Weinberger, supra*, 95 S.Ct. at 2467. To again quote *Jimenez II:*

> If the class is defined in this way, the exhaustion concerns embodied in § 405(g) and discussed in *Salfi* are satisfied. Thus, with respect to such a class, a "final decision of the Secretary" has been rendered, and judicial review in the district court was appropriate.

523 F.2d at 695 n.10.

As the *Jimenez II* court again instructs, the second requirement of section 405(g) – commencement of an action within 60 days after the mailed notice of an adverse decision – has also been met in this case. First, because the filing of appellant's complaint should have tolled the 60-day statute of limitations for the full

class, *see American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the class would not be barred by the running of this statute. *See* 523 F.2d at 696. Second, the Secretary must have abandoned any claim based upon the 60-day limitations period because he has not raised it in the district court. *See* Fed. R. Civ. P. 8(c), 12(h)(i); *Salfi v. Weinberger, supra,* 95 S.Ct. at 2466. For similar reasons, the venue requirement of section 405(g) has been met in this case.

In addition to *Jimenez II* several other federal courts have recently confronted *Salfi* issues. None have examined section 405(g) in a thorough manner, as did *Jimenez II.* Without fully explaining their reasoning, the district courts in *Jablon v. Secretary of H.E.W.*, 399 F. Supp. 118 (D. Md. 1975), *appeals pending* Nos. 75-727 & -739, and *Coffin v. Secretary of H.E.W.*, 400 F. Supp. 953 (D.D.C. 1975), *appeal pending* No. 75-791, have declared *Salfi* to preclude broad class relief in constitutional challenges to the Social Security Act. On the other hand, the district court in *Boles v. Weinberger,* ____ F. Supp. ____, C.C.H. Unemployment Ins. Rptr. ¶14,385 (D.D.C. Sept. 15, 1975), held that

> the failure [of section 405(g)] to expressly provide for injunctive relief does not negate this Court's equitable power to afford such relief either in aid of its jurisdiction or to effectuate its judgment.

Id. at p. 2499-422. Accordingly, the court held that the valid request for injunctive relief necessitated the convening of a three-judge court pursuant to 28 U.S.C. § 2282.[1]

---

[1] *Salfi* issues have also been raised by the Government in *Mathews v. Eldridge*, No. 74-204, a due process challenge to the Social Security Administration's termination of benefit procedures, which is now under advisement in this Court.

II.

THE MERITS

A. Proper Standards of Judicial Scrutiny

Because "illegitimacy is not a highly visible characteristic, and the status can be changed" (Govt. Br. 28), the Secretary argues that discriminatory classifications based upon illegitimacy of birth need not be given special judicial scrutiny. There are two brief answers to this assertion. First, this Court has never required that special minorities protected by strict scrutiny be identifiable by sight. Aliens, for example, are just as "visible" as illegitimate children, and this Court has not hesitated to extend special scrutiny to that class. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Second, it should matter little how easily an illegitimate child in appellant's class could shed his or her illegitimate status and be legitimized. "From the point of view of the child it really makes no difference whether options [to legitimatize] were non-existent or simply not exercised." *Eskra v. Morton*, ____ F.2d ____, 7th Cir. No. 74-1906, slip op. at 8-9 (Sept. 29, 1975) (Stevens, J.). Because legitimization procedures are carried out by a child's parents, they are beyond his or her ability to control. Furthermore, by definition, the fathers of appellant's class are deceased. Thus, their aid in any legitimization process is foreclosed.

The Secretary has accordingly made no dent on appellant's claim that discriminatory classifications against illegitimate children must be strictly scrutinized by this Court.

B. Recent Decisions

Since the filing of Appellant's Brief, two federal courts of appeals have encountered the same constitutional issue presented in this case. In *Tanner v. Weinberger*, ____ F.2d ____, 44 U.S.L.Wk. 2209 (1975), the Sixth Circuit rejected the views of the district court in *Norton* and held the "support or residency" requirement of 42 U.S.C. § 416(h)(3)(C)(ii) to be unconstitutional. In *Adams v. Weinberger*, 521 F.2d 656 (1975), the Second Circuit reversed a district court judgment which had upheld the section's constitutionality, by granting the claimant benefits because he had in fact met the Act's support requirement. A constitutional decision was therefore avoided.

These events therefore leave the district court below as the only federal court to have upheld the constitutionality of the extra proof requirement imposed upon appellant's class.[2]

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[2] The Secretary (Govt. Br. 38 n.14) has asserted that this Court was incorrect in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in stating that "illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile (42 U.S.C. § 416(h)(2)(A)) ... are entitled to receive benefits without any further showing of parental support." *Id.* at 631 n.2. *See also id.* at 634-35.

We believe this Court's *Jimenez* statement was correct. Such a child would generally be deemed to have been legitimated by meeting the State intestacy laws. *See, e.g., Thomas v. Solis*, 263 Md. 536, 283 A.2d 777 (1971). A child who has been legitimated is deemed dependent by the Act, *see* 42 U.S.C. § 402(d)(3), and accordingly need not meet the "support or residency" requirement. *Accord Massey v. Weinberger*, 397 F.Supp. 817 (D.Md. 1975).

CONCLUSION

For the reasons asserted above and in Appellant's Brief, the judgment of the district court should be vacated and reversed and this case remanded for the entry of an appropriate class and injunctive decree.[3]

Respectfully submitted,

C. CHRISTOPHER BROWN
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, Maryland 21201

DENNIS SWEENEY
Legal Aid Bureau, Inc.
341 N. Calvert Street
Baltimore, Maryland 21202

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[3] Attorneys for Appellant gratefully acknowledge the assistance provided in the preparation of this Reply Brief by Michael Gidding and Charles Willis, law school seniors, University of Maryland School of Law.

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vs.

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Appellee.

BRIEF OF AMICUS CURIAE JOHN J. ROMERO, JR., BY MELODY HENDRICKS, HIS NEXT FRIEND, IN SUPPORT OF APPELLANT GREGORY B. NORTON, JR.

ANN REESE-BROADWELL,
THOMAS R. ADAMS,
Legal Aid Society of San Mateo County,
7324 Mission Street,
Daly City, California 94014,
Telephone: (415) 755-8550,
Attorneys for Amicus Curiae.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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I

INTEREST OF THE AMICUS CURIAE

John J. Romero, Jr., by his mother, Melody Hendricks, is the plaintiff in the case of *Hendricks v. Weinberger,* No. 74-1456, (N.D. Cal. December 20, 1974); (9th Cir. Appeal filed 2/12/75, No. 75-1525,

1975). He challenges the constitutionality of 42 U.S.C. § 416(h)(3)(C)(ii), the same statute which is challenged here by Gregory Norton. The decision of this Court in the case at hand will effectively resolve John J. Romero's challenge to the statute.

II

JURISDICTION

The first issue to be discussed here is the basis for this Court's jurisdiction over this appeal. Jurisdiction here depends upon the authority of the court below to issue an injunction against the operation of a federal statute for repugnance to the Constitution. If the court below had authority to issue such an injunction, then the three-judge court was properly convened, and direct appeal to this Court is appropriate, 28 U.S.C. § 2282 and 28 U.S.C. § 1253.

A. 42 U.S.C. § 405(g) AND THE ADMINISTRATIVE PROCEDURE ACT

Jurisdiction in the Court below was firmly based on the review provisions contained in the Social Security Act at 42 U.S.C. §§ 405(g) and (h). Those sections are set forth in Appendix A. They require that administrative remedies be exhausted before suit is filed in federal court. Whether or not the class exhausted its remedies, Norton clearly complied with 405(g) by exhausting his administrative remedies and filing a timely action in the District Court. The only issue before the three-judge court was the con-

stitutionality of the statute under which Norton was denied child's survivor's insurance benefits, 42 U.S.C. § 416(h) (3) (C) (ii). That issue was properly befor the court under 405(g), *Fleming v. Nestor,* 363 U.S. 603, at 607, (1960), *Weinberger v. Salfi,* 95 S.Ct. 2457 at 2466, (1975). Therefore the court below unquestionably had jurisdiction under 405(g) to determine the constitutionality of the statute he challenged.

Although the District Court's jurisdiction to review the constitutional issue under 405(g) is clear, the question of its authority to issue an injunction has been raised by this Court, *Salfi,* 95 S.Ct. 2457, at 2466 n. 8, and at 2478, n. 4. Amicus urges that if an injunction cannot be issued under 405(g), then it can be issued under the Administrative Procedure Act, 5 U.S.C. § 701-706, (hereinafter the "APA").

Section 405(g) provides for judicial review of a "decision of the Secretary". Section 405(h) precludes review of "decisions of the Secretary" under any statute but 405(g) and further provides that *no action* be reviewed under 28 U.S.C. § 1331. While this Court has held that "decision of the Secretary" includes a decision on the constitutionality of a federal statute, neither this Court nor any other court has decided whether "decision of the Secretary" includes a decision to enjoin a federal statute for repugnance to the Constitution. If "decision of the Secretary" *does* include a decision to issue an injunction, then that decision is reviewable under 405 (g), and the court below had the authority to affirm,

modify, or reverse that decision by issuing an injunction under 405(g) itself.[1]

If 405(g) does not provide the authority to issue an injunction, then an injunction can be issued under

[1]This Court has found jurisdiction in a case brought under 405(g) in which an injunction was requested, a three-judge court was convened, the injunction was denied and direct appeal to this Court was based upon 28 U.S.C. § 1253, *Jimenez v. Weinberger*, 417 U.S. 628 (1974).

Several courts have issued injunctions in class and individual actions under 405(g), see e.g., *Diaz v. Weinberger*, 361 F.Supp. 1 (S.D. Fla., 1973) (three-judge court) (set for reargument 95 S.Ct. 1346, 1975), and *Maracle v. Richardson*, 348 F.Supp. 234 (W.D. N.Y., 1972) (three-judge court). Others have found jurisdiction to review a request for an injunction under 405(g), convened a three-judge court under 2282 and 2284, and then denied the request for an injunction on the merits, see *Kohr v. Weinberger*, 378 F.Supp. 1299 (E.D. Pa. 1974) (three-judge court) vacated and remanded on other grounds, 43 U.S.L.W. 3682 (June 30, 1975), and *Bartley v. Finch*, 311 F.Supp. 876 (1970), aff'd 404 U.S. 980 (1971).

In *Wiesenfeld v. Secretary of HEW*, 337 F.Supp. 981 (D.N.J., 1973) (three-judge court), the district court found jurisdiction under 28 U.S.C. § 1331 and explicitly refused to consider whether jurisdiction existed under 405(g). *Id.* at 986. In its review of that case *sub nom. Weinberger v. Wiesenfeld*, 420 U.S. ....., 95 S.Ct. 1225, this Court affirmed the existence of jurisdiction under § 1331. *Id.* 95 S.Ct. at 1230, ftn. 10. There was no discussion in the *Wiesenfeld* opinion of whether jurisdiction existed under 405(g). A few months after *Wiesenfeld*, the Court ruled in *Weinberger v. Salfi*, ... U.S. ....., 95 S.Ct. 2457, that jurisdiction under 405(g) prohibited jurisdiction under 28 U.S.C. § 1331. Although the holding in *Salfi* on § 1331 would appear to overrule the holding in *Wiesenfeld* on § 1331 jurisdiction, the only discussion relevant to this relationship between the two cases is found in footnote 10 of the *Salfi* opinion:

> Section 405(g) jurisdiction in *Weinberger v. Wiesenfeld*, 420 U.S. ....., 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), was similarly present. *Salfi*, supra, 95 S.Ct. at 2468, ftn. 10.

Assuming that jurisdiction was founded on 405(g) in *Wiesenfeld*, and since this Court affirmed the issuance of an injunction against the Secretary in *Wiesenfeld*, the *Wiesenfeld* case would stand for the proposition that 405(g) includes the jurisdiction to issue an injunction.

the APA. The APA is fully set forth in Appendix B. § 701(a) of the APA states that it applies except to the extent that statutes preclude judicial review. Since 405(h) does not specifically mention the APA as a forbidden basis of jurisdiction, its use is only precluded if review is exclusively available under 405(g).[2] Review is exclusively available under 405 (g) for a "decision of the Secretary". If the decision to issue an injunction is a "decision of the Secretary", then review is exclusively available and an injunction can be issued.

While 405(g) is undoubtedly the exclusive method of review of a "decision of the Secretary", it does not restrict judicial review of a decision which the Secretary cannot make. Therefore, if "decision of the Secretary" does not include a decision to enjoin a federal statute for repugnance to the Constitution, then review is not exclusively available under 405(g). If review is not exclusively available under 405(g), then the APA applies.

It is clear that the APA is to be applied in conjunction with statutes which grant jurisdiction. The Court clearly has jurisdiction under 405(g) to review the constitutionality of the statute. Therefore the provisions of the APA are appropriately applied in

[2]In other contexts courts have held that 405(h) does not preclude review where the relief requested is unavailable under 405(g); *Rothman v. Hospital Service of Southern California*, 510 F.2d 956 (9th Cir. 1975); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663 (2d Cir. 1973); *Aquavella v. Richardson*, 437 F.2d 397 (2d Cir. 1971); *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966).

conjunction with 405(g).[3] This Court has rendered at least nine decisions in which, where statutory jurisdiction was established, the review provisions of the APA were applied in addition to those mentioned in the statute granting jurisdiction, *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 95 S.Ct. 438 (1974) (APA applied in conjunction with 28 U.S.C. 1336); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (jurisdiction based on 49 U.S.C. 1655(h) and the APA); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (APA used in conjunction with the National Bank Act, 12 U.S.C. 24, subd. 7, 1864); *Camp v. Pitts*, 411 U.S. 138 (1973) (APA used with the National Bank Act, 12 U.S.C. 24 subd. 7, 1864); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (APA applied in conjunction with 28 U.S.C. 2201); *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967) and *Gardner v. Toilet Goods Association*, 387 U.S. 167 (1967) (APA applied in conjunction with 28 U.S.C. 2201); *Rusk v. Cort*, 369 U.S. 367 (1962) (APA applied in conjunction with 28 U.S.C. 2201); *Brownell v. We Shung*, 352 U.S. 180 (1956) (APA applied with the Immigration and Nationality Act, 8 U.S.C. 1105(a) (9) (b)); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (APA applied with the Immigration and Nationality Act, 8 U.S.C. 1105(a) (9) (b)).

[3]Although it is possible to argue that the APA provides an independent basis of jurisdiction, *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 at 627 (1973), it is not necessary to find independent APA jurisdiction here, since jurisdiction is clearly established under 405 (g).

Congress provided for the application of the APA in conjunction with other statutes in order to provide a reasonably uniform system of judicial review, H.R. No. 1980, 79th Cong., 2nd Sess. (1946), U.S. Code Congressional Service (1946) 1197 at 1203, 1204. The APA was thus meant to fill in essential requirements and to confer numerous procedural rights. *Id.* at 1198. The legislative history of the APA and decisions of this Court show that Congress intended that the APA be applied in conjunction with other statutes. In this case, if 405(h) does not preclude APA review, then the APA must be applied with 405(g).[4]

[4]The remaining prerequisites for APA jurisdiction are easily established here. Section 701 states that the action complained of is not subject to review under the APA if it is committed by law to agency discretion. This Court has specifically found that a decision of the Secretary to apply an allegedly unconstitutional statutory restriction is "nondiscretionary", *Weinberger v. Salfi, supra*, at 4989. This Court has further held that it is "beyond the power of the Secretary" to affect the plain wording of a statute which is alleged to be unconstitutional and that the constitutionality of a statute is "beyond his jurisdiction to determine", and that "a matter of constitutional law is concededly beyond his competence to decide", *Weinberger v. Salfi, supra*, at 4989 and 4990.

Section 702 states that review is available to a person suffering legal wrong because of agency action within the meaning of a relevant statute. Norton claims that he is entitled to social security benefits. He has been denied those benefits by the Social Security Administration. He is unquestionably a person adversely affected or aggrieved by agency action and claims that he is suffering a legal wrong because of agency action. He is such a person within the meaning of "a relevant statute" (Sec. 405(g)) in that he is an individual who was a party to a hearing and has received a final decision of the Secretary.

Sections 703 and 704 state that the APA applies if the statutory review procedure is inadequate. If 405(g) does not provide for review of a request for an injunction, then it is inadequate, because Norton has requested an injunction.

Section 706 provides that constitutional issues are properly raised under the APA.

The inescapable conclusion is that Norton's request for an injunction must be reviewed under either 405(g) alone or under 405(g) in conjunction with the APA. While review can be avoided under one or the other of the statutes, it cannot be avoided under both. The avoidance of review under one compels review under the other. Thus the court below had authority to issue an injunction, a three-judge court was properly convened, and direct appeal is to this Court.

B. 28 U.S.C. § 1361

28 U.S.C. § 1361 provides an independent source of jurisdiction and the court below found jurisdiction under § 1361, *Norton v. Richardson,* 352 F.Supp. 594, 598 (D. Md. 1972); *Norton v. Weinberger,* 364 F. Supp. 1117, 1119 (D. Md. 1973) (three-judge court). This section states:

> The district courts shall have original jurisdiction of an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The legislative history of § 1361 demonstrates that Congress intended all the district courts to have mandamus jurisdiction as previously exercised over federal officers by the district court in the District of Columbia. Senate Report No. 1992, 87th Cong. 2nd Sess. (1962), 1962 U.S. Code Cong. & Admin. News 4327. See also Byse & Fiocca, "Section 1361 Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action", 81 Harv. L. Rev. 308, 308-318 (1967). This Court has previously held that the district court in the District of Columbia has mandamus jurisdiction to enforce the constitutional duties of federal officers. U.S. ex rel. *Turner v. Fisher,* 222 U.S. 204 (1911).[5]

In this case the duty owed to the plaintiff by the Secretary does arise from the Constitution. Although this Court has never interpreted § 1361, all of the circuits which have considered the question have found that jurisdiction may exist where the alleged duty arises from the Constitution. *National Ass'n of Gov't Employees v. White,* 418 F.2d 1126, 1129 (D.C. Cir. 1969); *Ashe v. McNamara,* 355 F.2d 277, 280 (1st Cir. 1965); *Langevin v. Chenango Court, Inc.,* 447 F.2d 296, 300 (2nd Cir. 1971); *Richardson v. United States,* 465 F.2d 844, 849-51 (3d Cir. 1972) *(en banc) rev'd on other grounds,* 418 U.S. 160 (1974); *Burnett v. Tolson,* 474 F.2d 877, 880-81 (4th Cir. 1973); *Carter v. Seamans,* 411 F.2d 767, 772-73 (5th Cir. 1969), *cert. den.* 394 U.S. 934 (1969); *Walker v. Blackwell,* 360 F.2d 66, 67-69 (5th Cir. 1966); *Mead v. Parker,* 464 F.2d 1108, 1110-12 (9th Cir. 1972); *Smith v. McNamara,* 395 F.2d 896, 899-900 (10th Cir. 1968); *Martinez v. Richardson,* 472 F.2d 1121, 1125-26, ftn. 12 (10th Cir. 1973). Four district court opinions are

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[5]This Court has also held that mandamus may issue to compel state officials to perform a constitutional duty, *State of Missouri ex rel. Gains v. Canada,* 305 U.S. 337 (1938); *Sipuel v. Board of Regents,* 332 U.S. 631 (1948) *accord Board of Liquidation v. McComb,* 2 Otto 531, 92 U.S. 623 (1876); *Pennoyer v. McConnaughy,* 140 U.S. 1 (1891).

also frequently cited in support of this proposition, *Murray v. Vaughn,* 300 F.Supp. 688, 696-97 (D.R.I. 1969); *Fifth Avenue Peace Parade Committee v. Hoover,* 327 F.Supp. 238, 243 (S.D.N.Y. 1971); *Cortright v. Resor,* 325 F.Supp. 797, 812 (E.D.N.Y. 1971); and *Kelley v. Metropolitan County Board of Education,* 372 F.Supp. 528, 538-39 (M.D. Tenn. 1973).

In their exercise of § 1361 jurisdiction, the courts may not interfere with the legitimate exercise of administrative discretion, but may only compel the performance of those duties required by law.[6] Since the only issue in this case is a legal one concerning the constitutionality of 42 U.S.C. § 416(h)(3)(C) (ii) the Secretary's discretion is not involved.

The jurisdictional requirements of § 1361 may be satisfied by allegations of the existence of a non-discretionary legal duty owed to the plaintiff. In order to establish jurisdiction it is not necessary to decide the merits of the case and conclude that it is actually appropriate to issue the writ. Norton's allegations are sufficiently substantial to give the three-judge court the power to consider the case and to decide whether to issue the writ of mandamus, *West Coast Exploration v. McKay,* 213 F.2d 582, 590-92 (D.C. Cir. 1954) *cert. den.* 347 U.S. 989 (1954); *Carter v.*

[6]The legislative history of § 1361 makes clear that the courts may ". . . issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision." S.Rep. No. 1992, 87th Cong. 2nd Sess. (1962); 1962 U.S. Code Cong. & Admin. News 4326, 27.

Seamans, supra, 411 F.2d at 770, *see, e.g. Hagans v. Lavine,* 415 U.S. 528 (1974).

When Congress enacted § 1361, they were mindful of technical obstacles which frustrated the ability of ordinary citizens to obtain judicial review of the actions of federal officials. Congress specifically rejected a policy of tailoring "our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government." Senate Rp't 1992, *supra,* 1962 U.S. Code Cong. & Admin. News at 4328. Technical restrictions on § 1361 jurisdiction could defeat the ameliorative purposes of Congress and impede citizens who seek no more than that a federal officer perform his duty. *See generally, Byse & Fiocca, supra;* Davis, Administrative Law Treatise § 23.10 (1970 Supp.).

III

42 U.S.C. § 416(h)(3)(C)(ii) IS UNCONSTITUTIONAL

In order for a child to obtain survivor's benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401 *et seq.,* the child must be dependent, 42 U.S.C. § 402(d)(1)(C). However, all legitimate children are presumed dependent, 42 U.S.C. § 401(d)(3). Illegitimate children may also receive the benefit of this presumption if their parents performed a seemingly valid marriage ceremony [§ 416(h)(2)(B)] or if the deceased insured had acknowledged the illegitimate child in writing [§ 416(h)(3)(C)(i)(I)] or if a court

had decreed the deceased insured to be the father [§ 416(h)(3)(C)(i)(II)] or if the deceased insured had been ordered to support his illegitimate child [§ 416(h)(3)(C)(i)(III)]. None of these children must prove dependency. For each of these categories the law creates a presumption of dependency. However, illegitimate children not fitting into any of these categories must prove both that the insured individual was their father and that

> such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.
> [§ 416(h)(3)(C)(ii)].

This provision creates a separate classification of illegitimate children. Although these children can prove to the satisfaction of the Secretary that the deceased insured was their father, this class of illegitimate children is denied the presumption of dependency.

The legislative history demonstrates that the purpose of these provisions was to replace support lost by the death of the father. The survivorship benefits are described as:

> . . . [A] national program that is intended to replace the support lost by a child when his father . . . dies . . . S. Rep. No. 404, 89th Cong., 1st Sess. 101; 1965 U.S. Code Cong. & Admin. News 1943 at 2050.

Although Congress intended survivor benefits to replace "lost support", most children were not required to prove that their deceased fathers were actually

supporting them, 42 U.S.C. §§ 401(d)(3), 416(h)(2)(B), 416 (h) (3) (C) (i). However, proof of actual support would be unnecessary for children who were legally entitled to support and who, because of their father's death, lost the ability to enforce the support obligation against their father's wages. The loss of an economically valuable right, such as the right to enforce support, is equivalent to an actual loss which the survivor's benefits were intended to replace.

In contrast the category of illegitimate children to which Norton belongs did not generally possess a right to support in 1965. In order for this group to show that they had lost support on account of the death of their fathers, Congress required them to prove that they actually received support from their fathers.

Thus, Congress determined that a child could establish "lost support" either by proof of actual support or by membership in a group of children who were legally entitled to support. Legislative history provides abundant support for this interpretation of Congressional intent. The Senate Report states that eligibility depended on whether "the father was supporting the child or had a legal obligation to do so". Senate Report No. 404, *supra,* 1965 U.S. Code Cong. & Admin. News at 1958. Similarly Congressman Wilbur Mills, Floor Manager of the bill containing these provisions, explained that the test for a child was "if the father was supporting the child or had a legal obligation to do so". House-Senate Committee Conference Report on 1965 Amendments to the Social

Security Act, 111 Cong. Rec. 18387 (July 27, 1965). Likewise the Advisory Council on Social Security reported to Congress that a child's eligibility should no longer depend on his rights to inherit intestate personal property under state law:

> "The Council believes that in such a program whether a child gets benefits on the earnings record of a person who has been determined to be his father *and who has an obligation to support him* should not depend on whether he can inherit that person's intestate personal property under the laws of the state in which the person happens to live." Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement, 67 (Washington, D.C., 1965). (emphasis added).

Thus, Congress established a system of providing benefits to those who had an enforceable right to support and to those without such a right who could prove actual support.

However, the state of the law changed in 1973, when this Court found that legitimate and illegitimate children have an identical right to enforce support. In *Gomez v. Perez,* 409 U.S. 535 (1973), the Court held that once a state creates a judicially enforceable right for legitimate children to obtain support from their fathers, that same right to enforce support must exist for illegitimate children. In light of this recent decision, Norton and his class possess a judicially enforceable "right to support." Section 416(h) (3) (C) (ii) now operates to discriminate between classes of children, all of whom possess the right to support, by requiring only illegitimate children to prove any actual support. Neither the illegitimate children, nor the legitimate children can enforce their right to support because of the death of their fathers. Both the legitimate and the illegitimate children have lost the support which survivor's benefits were intended to replace. Under such circumstances the requirement that certain illegitimate children prove actual dependency is an irrational classification and an invidious discrimination against them. *Levy v. Louisiana,* 391 U.S. 68 (1968); *Glona v. American Guarantee & Liability Insurance Co.,* 391 U.S. 73 (1968); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Jimenez v. Weinberger,* 417 U.S. 628 (1974).

In *Frontiero v. Richardson,* 411 U.S. 677 (1973), the Court found unconstitutional a statutory scheme very similar to this one. In *Frontiero,* the statutes presumed that wives were dependent on their working husbands, while working wives were required to prove that their husbands were dependent on them. Similarly the statutes at issue here presume that legitimate children are dependent while Norton's class of illegitimate children must prove dependency. In *Frontiero,* the discrimination was against women; in *Norton,* the discrimination is against illegitimate children.

The irrationality of this discrimination against illegitimate children is further dramatized by the fact that their eligibility is made to depend upon the actions of their father over whom they have no control. In *Weber, supra,* the Court condemned another statutory scheme that operated to the same effect:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. *Id.* at 175.

These illegitimate children have lost support because the deaths of their fathers prevent them from obtaining the economic benefits of a support order in court. The Social Security Act denies benefits because the fathers successfully avoided their legal obligations to support their own children. In so doing the government of the United States reinforces the reprehensible conduct of the fathers. The operation of this statute against illegitimate children is plainly and simply irrational.

IV

CONCLUSION

For the reasons stated above, amicus urges this Court to find jurisdiction over this appeal and to reverse summarily the judgment of the court below and enjoin the operation of 42 U.S.C. § 416(h) (3) (C) (ii) for repugnance of the Constitution.

Dated, August 29, 1975.

ANN REESE-BROADWELL,
THOMAS R. ADAMS,
Legal Aid Society of San Mateo County,
Attorneys for Amicus Curiae.

(Appendices Follow)

APPENDIX

Appendix A

42 U.S.C. §§ 405(g) and (h):

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only

the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Appendix B

The Administrative Procedure Act, 5 U.S.C. §§701-706:

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.